APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

No. 76-1168

STATE OF ARIZONA,
RICHARD BOYKIN, SHERIFF,
PIMA COUNTY, ARIZONA,

Petitioner,

v.

GEORGE WASHINGTON, JR.,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

Petition for Certiorari Filed
February 23, 1977

Certiorari Granted on April 18, 1977

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EXCERPTS (Continued)

APPENDIX

RELEVANT DOCKET ENTRIES

pertaining to

Case Nos. 75-3634, 75-3689;

George Washington, Jr.,

Appellant,

vs.

State of Arizona, William C. Cox, Sheriff, Pima County, Arizona,

Appellee,

in the

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PROCEEDINGS/FILINGS	DATE FILED
1. Notice of Appeal, filed by State of Arizona.....	10/31/75
2. Notice of Cross Appeal, filed by George Washington, Jr.....	11/25/75
3. Motion to Dismiss Cross Appeal, filed by State of Arizona.....	12/9/75
4. Opposition to Motion to Dismiss Cross Appeal, filed by George Washington, Jr.....	12/19/75

RELEVANT DOCKET ENTRIES (Continued)

5. Certified Transcript of the Record on Appeal, filed as of December 15, 1975 by the United States District Court for the District of Arizona....12/29/75

6. Motion to Supplement the Record on Appeal with Superior Court Transcript of Jury Trial, January 8, 1975, filed by the State of Arizona.....5/6/76
(Refiled by the State of Arizona.....7/9/76

7. Brief, filed by George Washington, Jr.....5/7/76

8. Opposition to Motion to Supplement Record on Appeal, filed by George Washington, Jr.....5/12/76
(Refiled by George Washington, Jr.....7/12/76

9. Reply Brief, filed by the State of Arizona.....5/24/76

10. Order, denying the Motion to Supplement the Record on Appeal because the material was not before Judge Walsh.....7/15/76

11. CAUSE ARGUED, submitted to Judges Merrill, Kilkenny and Anderson.....9/8/76

RELEVANT DOCKET ENTRIES (Continued)

12. Opinion filed..... 12/3/76

13. Petition for Rehearing, filed by the State of Arizona..... 12/17/76

14. Order denying Petition for Rehearing, amending Original Majority Opinion..... 1/20/77

15. Notice from U.S.S.C. re filing Petition for Writ of Certiorari, dated February 23, 1977.... 2/28/77

16. Order staying action on Motion by Washington for release on bail pending disposal by U.S.S.C. of Petition..... 3/24/77

17. Certified Copy of Order From U.S.S.C. granting Certiorari on April 18, 1977..... 4/25/77

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

ALICE TRUMAN
JUDGE, of the Superior Court

NO. A-18980

DATE: June 4, 1973

STATE OF ARIZONA,
Plaintiff

James Howard and
Jon R. Cooper
Plaintiff's Attorney

GEORGE WASHINGTON, JR.
Defendant

Robert Hirsh and
Ed Bolding
Defendant's Attorneys

MINUTE ENTRY

ORAL ARGUMENT ON DEFENDANT'S MOTION FOR NEW TRIAL:

Defendant not present.
Joseph Trujillo reporting.
Messrs. Hirsh and Howard
argue to the Court.

IT IS ORDERED Defendant's motion for new trial is granted on the grounds of violation of due process and newly discovered evidence.

/s/ Alice Truman
Judge

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

STATE OF ARIZONA, Appellant, vs. GEORGE WASHINGTON, JR., Appellee.	NO. 2408-2 MEMORANDUM DECISION (Not for Publication, Rule 48, Rules of the Supreme Court)

Appeal from the Superior Court of
Pima County

Honorable Alice Truman,
Judge

(Cause No. A-18980)

Filed June 20, 1974

Order Affirmed: Cause Remanded

Gary K. Nelson
The Attorney General — Phoenix
and
Dennis DeConcini
Pima County Attorney
By James M. Howard
Deputy County Attorney — Tucson

Attorneys for Appellant

Ed Bolding
Former Pima County Public
Defender — Tucson

John M. Neis
Pima County Public
Defender — Tucson
and
Robert J. Hirsh — Tucson

Attorneys for Appellee

HAYS, Chief Justice

On May 21, 1971, the defendant, George Washington, Jr., was found guilty by a jury of first degree murder.

Thereafter, the defendant moved this court for suspension of his pending appeal and for a new trial on the grounds that new evidence had been discovered. This court granted the motion to suspend the appeal and the case was remanded to the trial court for an evidentiary hearing on the motion for new trial. A hearing was held and a motion for new trial was granted on the grounds of violation of due process and newly discovered evidence. The state is now appealing this order pursuant to A.R.S. §13-1712(2).

The rule in effect in Arizona at the time of the alleged offense was Rule 311, Arizona Rules of Criminal Procedure, 17 A.R.S., which states in part that:

> "A. The court shall grant a new trial if any of the following grounds is established, provided the substantial rights of the defendant have been thereby prejudiced:
>
> . . .
>
> "5. That the county attorney has been guilty

male, very heavy set, with a pot belly, no mustache, and sporting a big Afro hair style. Defendant is a much lighter weight Negro male with a crew cut and a mustache.

Hanrahan subsequently changed his story. However, the initial statements of Hanrahan which tend to absolve defendant from criminal liability were never disclosed to the defense counsel nor to the court.

There is no evidence more valuable to a defendant than the testimony of an eyewitness that he did not commit the crime in question. The prosecution has an affirmative obligation to assure that a defendant receives a fair trial. The suppression of evidence was clearly prejudicial to the defendant and a new trial was warranted.

Another rule in effect in Arizona at the time of the alleged offense was Rule 310, Arizona Rules of Criminal Procedure, 17 A.R.S., which states in part that:

> "The court shall grant a new trial if any of the following grounds is established:
>
> . . .
>
> "3. That new and material evidence, which if introduced at the trial would probably have changed the verdict or the finding of the court, is discovered which the defendant could not with reasonable diligence have discovered and produced upon the trial." (Emphasis added).

The requirements which must be satisfied before a trial court may grant a new trial on the basis of newly discovered evidence were defined in State v. Davis, 104 Ariz. 142, 449 P.2d 607 (1969). As a general rule, a new trial for newly discovered evidence will not be granted to permit the introduction of testimony of a witness whose identity was known by the moving party at the time of the trial. However, in addition to knowing the identity of the witness, the moving party must also have prior knowledge of the substance of the testimony of this witness. See State v. Ford, 108 Ariz. 404, 499 P.2d 699 (1972); State v. Propp, 104 Ariz. 466, 455 P.2d 263 (1969); State v. Maloney, 101 Ariz. 111, 416 P.2d 544 (1966).

In the case at bar, the new trial was properly granted. The defense counsel did not have prior knowledge of the substance

of the testimony of the witness because he testified that his information was discovered in an after-trial conversation with Hanrahan.

In State v. Turner, 92 Ariz. 214, 375 P.2d 567 (1962), this court set forth the requisites for compliance with the due diligence requirement:

> "[T]he accused...must show by affidavit or testimony in court, that due diligence was used to ascertain and produce the evidence in time for use at his trial. He must account for his failure to produce the evidence by stating explicitly the details of his efforts to ascertain and procure it."
> 375 P.2d at 571.

The transcripts of the new trial hearing reveal the efforts of defense counsel to ascertain the nature and extent of Hanrahan's knowledge of the murder.

Furthermore, the transcripts also indicate that Hanrahan allowed himself both in the Pima County jail and in the courthouse to be "wired for sound" to allow the prosecution to listen and record a conversation between himself and defense

counsel. The purpose of the "wiring" was to record any commitments by defense counsel to Hanrahan in return for perjured testimony at trial. Hanrahan was monitored by the taping of a concealed microphone and a transmitter to his body.

It appears that any attempt by defense counsel to obtain information from Hanrahan would have been futile because of the close working relationship between Hanrahan and the government.

The primary issue at trial was the identity of the assailant. No one at trial identified defendant as the assailant. Thus, the direct eyewitness testimony of Hanrahan on the issue of the identity of the assailant, if offered at a new trial, would in no way be cumulative. Testimony as to the identity of the assailant is material for it would tend to disprove the commission of the crime by the defendant.

Appellant argues that the testimony of Hanrahan would not change the verdict because Hanrahan is not a very credible witness because of his numerous prior inconsistent statements. Appellant maintains that the jury would not be influenced by the testimony of one who will say anything

that suits his immediate interest.

However, this court has stated in State v. Mason, 105 Ariz. 466, 466 P.2d 760 (1970), that:

> "The trial judge was in a much better position than we are to determine the weight to be given the affidavits and whether or not the testimony set forth in them would probably change the result in case of a new trial."
> 466 P.2d at 762.

It is well settled that an appellate court will not interfere with matters so peculiarly within the knowledge of the trial court unless an abuse of discretion existed. State v. Byrd, 94 Ariz. 139, 382 P.2d 555 (1963).

Therefore, we shall uphold the finding of the trial judge that the verdict would probably be changed by the testimony of Hanrahan.

The order of the trial court granting a new trial is affirmed and the cause remanded for further proceedings.

JACK D. H. HAYS, Chief Justice

CONCURRING:

JAMES DUKE CAMERON, Vice Chief Justice

FRED C. STRUCKMEYER, JR., Justice

LORNA E. LOCKWOOD, Justice

WILLIAM A. HOLOHAN, Justice

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

ALICE TRUMAN,
Judge,
of the Superior Court

NO. A-18980

DATE: December 13,1974

STATE OF ARIZONA,
Plaintiff

Plaintiff's Attorney

GEORGE WASHINGTON, JR.,
Defendants

Defendants' attorneys

MINUTE ENTRY
UNDER ADVISEMENT:

The Court having taken this matter under advisement, IT IS ORDERED the motion to dismiss is DENIED.

cc: County Attorney
Bolding, Barber, Oseran & Zavala
Court Administrator
Mary Alice Martin

Cathy Hintzen,
Deputy Clerk

NOTATION

ORDER by the Supreme Court of Arizona DECLINING TO ACCEPT JURISDICTION of Washington's PETITION FOR SPECIAL ACTION, dated February 13, 1975,

appears as Appendix G

to the Petition for Writ of Certiorari.

NOTATION

ORDER by the Supreme Court of Arizona DENYING WRIT OF HABEAS CORPUS to Washington, dated July 15, 1975,

appears as Appendix E
to the Petition for Writ of Certiorari.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA
(Civil Minutes - General)

Civil Case No. 75-85-Tuc.(JAW)
Title: GEORGE WASHINGTON, JR.

DATE: 10/2/75

vs.

STATE OF ARIZONA, et al

PRESENT:

HON. JAMES A. WALSH JUDGE

William G. Harris	David Lundy
Deputy Clerk	Court Reporter

ATTORNEY FOR PLAINTIFF(S)

Ed Bolding

ATTORNEY FOR DEFENDANT(S)

A. Bates Butler, III

PROCEEDINGS:

ORDERED:

The Court can not find that the order

granting mistrial was based on any finding of any manifested [sic] necessity for granting mistrial, consequently a further trial of the defendant would be a violation of the double jeopardy provision.

In the matter of granting the Writ, the court makes a provision that the writ will be granted within 60 days unless the State, in that period, has made notice of appeal of this courts decision to the Ninth Circuit. If appeal is taken the Writ will not be issued until the disposition of the appeal.

NOTATION

ORDER by the United States District Court for the District of Arizona GRANTING WRIT OF HABEAS CORPUS TO Washington, dated October 17, 1975,

appears as Appendix D

to the Petition for Writ of Certiorari.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
W. COY COX, SHERIFF,
PIMA COUNTY, ARIZONA,

Appellants,

No. 75-3634

vs.

GEORGE WASHINGTON, JR.,

Appellee.

GEORGE WASHINGTON, JR.,

Cross-Appellant,

No. 75-3689

vs.

STATE OF ARIZONA,
W. COY COX, SHERIFF,
PIMA COUNTY, ARIZONA,

Cross-Appellees.

OPINION

(December 3, 1976)

Appeal from the United States
District Court District of
Arizona

Before: MERRILL, KILKENNY and
ANDERSON, Circuit Judges:

KILKENNY, Circuit Judge:

This appeal concerns the propriety of a retrial of George Washington, Jr., [appellee] following the declaration of a mistrial in state court. The district court conditionally granted the appellee's petition for a writ of habeas corpus pending appeal to this court. We affirm and order the immediate execution of the Writ.

FACTS

FIRST TRIAL AND APPEAL

The appellee was charged in the Arizona state court in February 1971 with murder. Prior to trial, he moved for the production of all Brady[1] materials. When the prosecutor denied having any Brady material in his file, the trial commenced and the appellee was found guilty of first degree murder (May 21, 1971).

On appeal to the Arizona Supreme Court, the case was remanded for a hearing on appellee's motion for a new trial. At the end of the lengthy hearing, the trial judge granted the motion. On the state's

[1] Brady v. Maryland, 373 U.S. 83 (1963).

appeal, this order was affirmed on which appeal the Arizona Supreme Court held that the suppression of the evidence was clearly prejudicial to the appellee and that a new trial was warranted.

Subsequently, the appellee filed a motion to dismiss, contending that the double jeopardy clause prohibited his re-prosecution and that he had been denied a speedy trial. This motion was denied on December 13, 1974.

SECOND TRIAL, MISTRIAL AND APPEAL

The voir dire for prospective jurors in the second trial began on January 7, 1975. During his voir dire, the prosecutor informed the veniremen that four years had passed since the commission of the crime and that witnesses memories were likely to fade. As an introduction to the notions of impeachment and refreshing recollection, the prosecutor further informed them that many of the witnesses had been involved "in at least two prior proceedings." Defense counsel moved for a mistrial out of the presence of the jury on the basis of, inter alia, the prosecutor's reference to these "two prior proceedings." This motion

was denied. During his voir dire of the jury, defense counsel informed the prospective jurors that there had in fact been a prior trial and he asked them to disregard that fact.

The relevant remarks of defense counsel in his opening statement follow:

> "You will hear that that evidence was suppressed and hidden by the prosecutor in that [first] case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case." [Emphasis supplied.]

Just after the noon recess, taken shortly after these remarks were made, the state moved for a mistrial on the ground that, inter alia, the defense counsel's allegations of prosecutorial misconduct were highly prejudicial and that the state could not get a fair trial. The court expressed concern that the proceedings were

turning into a trial of the county attorney's office but, nevertheless, denied the motion.

The state renewed its motion the following morning before the jury was called. After argument by both sides concerning the propriety of defense counsel's mention of the Arizona Supreme Court's memorandum opinion, the court granted the motion, saying:

> "Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted."

On January 24, 1975, the appellee filed a special proceeding in the Supreme Court of Arizona in which he claimed that retrial was barred by both the double jeopardy clause and the due process clause of the United States Constitution. The Supreme Court declined to accept jurisdiction.

On April 4, 1975, the appellee filed a petition for a writ of habeas corpus in the district court. The petition

was granted on the ground that the record contained nothing to indicate that the state trial judge found "manifest necessity" for this grant of a mistrial.

From this ruling, and from an additional district court order denying the state's motion to reopen the evidence, all parties have appealed.

ANALYSIS

The constitutional standards for review in mistrial cases were first enunciated by Justice Story in United States v. Perez, 22 U.S. (9 Wheat) 579 (1824):

> "...the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

Id. at 580.

The concepts of "manifest necessity" and the "ends of public justice" are thus firmly embedded in our constitutional

history and are central to the solution of all double jeopardy inquiries. United States v. Sanford, ____ U.S. ____ (October 12, 1976), rev'g. 536 F.2d 871 (CA9 1976); United States v. Dinitz, 424 U.S. 600 (1976); Illinois v. Somerville, 410 U.S. 458 (1973).

The power to discharge a jury prior to verdict is discretionary with the trial court, but should be employed only "with the greatest caution, under urgent circumstances, and for very plain and obvious cause;..." Perez at 580. As stated in United States v. Jorn, 400 U.S. 470, 485 (1971):

> "...the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to take his case to the original jury] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." [Emphasis supplied.]

In the absence of clear abuse, we are normally inclined to uphold discre-

tionary orders of this nature. In the usual case, the trial judge has observed the complained-of event, heard counsel, and made specific findings. Under such circumstances, a mistrial declaration accompanied by a finding that the jury could no longer render an impartial verdict would not be lightly set aside.

The facts before us, however, reveal a dissimilar set of circumstances and no findings whatsoever. We agree with the state that the remarks made by defense counsel in his opening statement were improper.[2]

However, we decline to imply from

---

[2]What the Supreme Court of Arizona said about the conduct of the county prosecutor has no relevance or materiality on the issue of the appellee's innocence/guilt. Furthermore, Rule 48 (c) of the Rules of the Supreme Court of Arizona provides that memorandum decisions "...shall not be regarded as precedent nor cited in any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case.

this impropriety that the jury was completely prevented from arriving at a fair and impartial verdict. If this was the case, the trial judge should have so found. He at no time, however, indicates the reason(s) why he granted the mistrial. Furthermore, his short order, quoted supra, is not susceptible to any inference that will fill this void. In the absence of any finding by trial court or any indication that the court considered the efficacy of alternatives such as an appropriate cautionary instruction to the jury, we must conclude that neither of the tests of Perez ("manifest necessity" or "ends of public justice") has been met. We do not hold that these words are talismanic; we hold only that this particular record fails to reveal a "scrupulous exercise of judicial discretion," and that more consideration should have been given to the appellee's "valued right to have his trial completed by a particular tribunal." Jorn at 484-5. We have reluctantly concluded that the double jeopardy clause precludes a retrial of the appellee.

In view of our disposition of this issue, we need not reach the remaining

issues advanced by the parties.

AFFIRMED.

MERRILL, Circuit Judge, with whom Judge Anderson concurs, concurring:

I concur with Judge Kilkenny but would like to emphasize the fact that a finding of manifest necessity was not implicit in the order granting mistrial.

The question to which such a finding is directed in a case such as this is whether misconduct was such as to prejudice the jury beyond remedy by a cautionary instruction or other means and thus preclude fair trial by that jury. It is not enough to find that certain conduct was improper. The critical question is the effect of that conduct upon the jury.

Here the greater part of argument on the motion for mistrial was devoted to the question of whether the remarks of defense counsel were improper - whether the Arizona Supreme Court decision could properly be brought to the jury's attention. When the motion for mistrial was first argued the judge, at one point, indicated that if the supreme court decision was not admissible in evidence, and reference to it was therefore improper, he was disposed to

grant mistrial. At the conclusion of that argument mistrial was denied, because the court was not ready to rule on admissibility, but state counsel was invited to renew the motion at any appropriate time. The motion was renewed the following day and an Arizona rule of practice was, for the first time, called to the court's attention. It provided that on new trial reference could not be made to the earlier trial. At the conclusion of argument mistrial was granted. While manifest necessity was also argued on this occasion, absent findings that manifest necessity existed, it is quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established without reaching the question whether there could, nevertheless, be a fair trial.

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

STATE OF ARIZONA, W. COY COX SHERIFF, PIMA COUNTY, ARIZONA, Appellants.	)	NO. 75-3634
v.	)	
GEORGE WASHINGTON, JR., Appellee,	)	
GEORGE WASHINGTON, JR., Cross-Appellant,	)	
v.	)	
STATE OF ARIZONA, W. COY COX SHERIFF, PIMA COUNTY, ARIZONA, Cross-Appellees.	)	NO. 75-3689
	)	ORDER

Appeal from the United States District Court, District of Arizona

Before: MERRILL, KILKENNY and ANDERSON, Circuit Judges

The Petition for rehearing is denied.

The original majority opinion filed December 3, 1976, is amended to delete the word "completely" on line 3, page 5.

The issuance of the mandate is stayed for a period of 20 days from the date of the filing of this order.

of misconduct.

. . .

> "B. The court shall also grant a new trial when from any other cause not due to his own fault the defendant has not received a fair and impartial trial."

Defendant argues for a new trial on the ground that he was prejudiced by the deliberate suppression of evidence by the state.

On the issue of suppression of evidence, the United States Supreme Court has stated in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), that:

> "[T]he suppression by the prosecution of evidence favorable to an accused. . .violates due process where the evidence is material to guilt or to punishment." 373 U.S. at 87.

In the case at bar, an alleged eyewitness named Hanrahan told the Tucson Police Department, the Pima County Sheriff's Department and the Pima County Attorney's Office that he had seen the murderer flee from the scene of the crime and that it was not the defendant. The murderer was vividly described by Hanrahan as a Negro

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

RELEVANT EXCERPTS

from the

HEARING ON WASHINGTON'S

MOTION FOR NEW TRIAL

April 30, 1973

May 1, 1973

June 4, 1973

[50-51]

CONTINUED DIRECT

BY MR. HOWARD?

Q. Mr. Cooper, why did you feel that it wasn't necessary to disclose this tape that has been marked in evidence under Brady versus Maryland?

A. I don't feel that there is anything at all on that tape that in any way is helpful to the defense or tends to absolve Goerge Washington from criminal liability. As a matter of fact, it is just to the contrary.

Q. Is there anything--did you have any reason to believe that Mr. Washington's lawyer was not aware of Mr. Hanrahan and what Mr. Hanrahan had actually observed?

A. No, quite to the contrary. I was outside the courtroom when Mr. Bolding walked up and talked to Mr. Hanrahan.

Q. Prior to May 13, 1972, did you have any knowledge whatsoever of Mr. Hanrahan's possible involvement or possibly, him possibly action--being a witness to the crime involved in this case?

A. No, I did not.

MR. HOWARD: I have no further questions.

MR. HIRSH: I have nothing further.

May 1, 1973
[300 - 314]

BY MR. HIRSH:

Q. Please state your name and occupation, please, sir?

A. William R. Stevens, Jr., Chief Criminal Deputy, Pima County Attorney's Office.

Q. And what was your employment, Mr. Stevens, in May of 1971?

A. I was employed in the same capacity.

Q. The Chief Deputy Criminal Attorney?

A. That's correct.

Q. What does that mean, sir?

A. The office is divided into a Civil Division and Criminal Division and I head the Criminal Division.

Q. And does that mean that you are in charge of all the criminal prosecutions that emanate from the Pima County Attorney's Office?

A. With the understanding, of course, as the County Attorney and Chief Deputy to be consulted, yes.

Q. Now, let me ask you, sir, we have heard some testimony about Ed Bolding being

investigated by your office--

A. Yes.

Q. Is that correct, sir?

A. I don't know what you have heard.

Q. Well--

A. I assume, yes.

Q. That's the testimony in this case--

A. All right.

Q. --is that correct, sir?

A. Yes, it is correct.

Q. And is that investigation continuing right now?

A. Not in an open sense, but yes, it is still, from what we had and what was developed, if there can be corroboration or additional information, yes, it would be.

Q. Now, was there such an investigation in May of 1971?

A. Yes.

Q. And when did the investigation of Mr. Bolding start?

A. I can't give you dates. I can only give you events.

Q. Who--well, can you give us some idea how long prior to May of 1971 such investigation existed?

Q. No, I don't believe there was--

Q. Can you tell us who headed the operation up or is that you?

A. I think it would be me.

Q. You were the head of the investigation?

A. I would say so.

Q. Sir, can you relate the basis for investigating Mr. Bolding or the basis that you had the spring of 1971?

A. I was made aware of a tape that was taken from a person by the name of Hanrahan, and I listed to that tape and to--

Q. I want to talk to you about that, but is that the first thing that came to your attention that caused your office to make an investigation of Mr. Bolding?

A. That's correct.

Q. There was nothing prior to that time?

A. That's true.

Q. And when you received this tape, and I understand you did get a tape from Deputy Sheriff Davis?

A. I don't--no, I think I first heard it with Rick Cooper.

Q. Rick Cooper told you about it?

A. Yes.

Q. You had no other information available to you or to your office about

any wrongdoing that Mr. Bolding had engaged in?

A. Totally, or in that case, or what are you talking about?

Q. Totally?

A. I would say I don't agree with some of the ways he practices law.

Yes, as far as an investigation, yes.

Q. You don't approve of some of the things he does in court--

A. True.

Q. --is that right?

A. In Court or while you are trying a case.

Q. Yes, but you had no information about him indicating that he was involved in any wrong doing of any kind?

A. No, not before that particular--

Q. Yes, sir. Now, how did you first hear about the existence of a tape that Hanrahan makes? Who first--

A. How did I first hear it?

Q. Yes.

A. To the best of my recollection, Rick Cooper came to my apartment and had the tape and I sat and listened to it.

Q. Rick Cooper had the tape?

A. That's correct.

Q. And do you know what day that is?

Q. No, I do not.

Q. Now did you make any reports about this matter at all?

A. No.

Q. Do you have notes in order to be able to refresh your memory to testify?

A. No.

Q. This is some time in May, though?

A. May of '71, yes.

Q. In the evening hours?

A. Yes.

Q. And did Cooper give you any additional information over and above playing the tape for you?

A. Yes, he told me--

Q. What did he tell you?

A.--how the information had come to his attention.

Q. What did he tell you about that?

A. I believe Mel Hill was at the jail and Hanrahan said something to him about, see that guy over there, or something to that effect, he is charged with a crime, and he did or didn't do it. I think it was he didn't do it, and then they talked to him and then he finally came out with

what was on that tape.

Q. Now, is that the extent of what Cooper told you?

A. No.

Q. Tell us what else Cooper told you?

A. I think at that time I was aware that Sergeant Bunting had continued the investigation since it was a Tucson Police Department case, and I'm pretty sure I knew that Bud Davis had been consulted in the case.

Q. Consulted in what capacity, sir?

A. I think he had arrested Hanrahan or had something to do with that before.

Q. Yes, So he was an officer working on the case?

A. No, I think it was more to them becoming aware of the information, turning it over to us.

Q. Was there anything else said by Cooper that night filling in as to the background of this thing?

A. Undoubtedly there was. That's to the best of my recollection.

Q. You have no further recollection at this time what was said?

A. I think we talked about what procedure we would follow and what we would

do from there.

Q. Did you and Cooper agree at that time to get Hanrahan in a situation where he could procure evidence against Bolding?

A. I don't think so.

Q. Wasn't discussed in any way?

A. Possibly, yes. I don't thing we reached that agreement.

Q. You mean you might have discussed, had that discussion with Cooper that night?

A. It would not have been a situation of deciding that, it was talked about what would we do.

Q. I understand that, sir. Could it have been that that was discussed as one of the alternatives that night with Cooper--

A. Possible.

Q. --at your apartment?

A. Very possible.

Q. What is the next thing you did in the case?

A. Again, to the best of my recollection, I think I made the Chief Deputy aware of what was going on.

Q. And that was who?

A. Dave Dingeldine, and eventually the County Attorney, Mrs. Silver at the time.

Q. And what decisions did you make?

A. We debated for quite a long time on what would be the proper decision.

Q. Who is we, sir?

A. Myself, Dingeldine, Mrs. Silver.

Q. Yes.

A. What would be proper, and there were several things that we were heavily concerned with before we made any decision.

Q. What decision did you ultimately come up with?

A. That we knew we had an ethical responsibility under the cannon of ethics to disclose the existence of perjury or the possible existence of perjury, and we knew that we should come forward to the trial court, to the court, and advise them umder the cannons but at the same time--

Q. Was that done, by the way, sir?

A. No, not to Judge Truman.

Q. Either before or after the trial of this case?

A. Not to Judge Truman. That was the thing that was bothering us.

Q. Why wasn't it done, why wasn't Judge Truman advised of this?

A. Because we felt that if this was not true and if Hanrahan was not being honest with us, it might be claimed that we were prejudicing Judge Truman, but yet we felt

we had to disclose this to the Court, so--

Q. You thought it might be--it would prejudice the trial judge who has hearings outside the presence of the jury and all sorts of material continually?

A. Legal prejudice, not actual prejudice, by any means.

Q. Legal prejudice in what way, Mr. Stevens?

A. If we came forward to Judge Truman and told her these things that we suspected and then they were groundless, it would obviously give grounds for some type of motion that we had done something improper.

Q. Mr. Stevens, why wasn't, after you found out that you could acquire no evidence against Mr. Bolding, after the taping had been concluded and Hanrahan had been wired on two occasions without any result, why was the trial judge at that time not advised as to what occurred?

A. Because you are leaving out numerous things that happened in the meantime, different advice that we sought and received. You can't answer that yes without all that.

Q. Well, can you give me any reason,

my question is, can you give me any reason why the trial judge was not advised after your efforts proved to be fruitless?

A. Because we felt at that time that we should go to the Presiding Judge and ask him would it be proper to go to Judge Truman at this time or should we hold off, and the Presiding Judge was not available, that would be Judge Robert Roylston, he was not available at the time, so we went to Judge Richard Roylston, told him what our problem was and asked did he think it was proper for us to go to Judge Truman and did he think it would be proper for us to continue our investigation.

Q. You talked to Judge Roylston prior to the making of both tapes?

A. There is three tapes or was.

Q. There were three tapes made between Bolding and Hanrahan?

A. We talked to Judge Roylston, after we had the tape that was brought to me first by Rick Cooper, to find out if the Judge felt there was anything improper in continuing to seek evidence of subornation of perjury or evidence of wrong doing. That was done before the second tape was made.

Q. Well, was Judge Roylston made aware of all of the instances where Hanrahan was wired and tapes were made?

A. Before they were done, yes.

Q. Was he advised of the results?

A. Yes, he was.

Q. Did you discuss with him whether or not Judge Truman should then be advised of the fact that you made an attempt and it proved to be fruitless?

A. I can't say for certain.

Q. Did you -- why did you not, after the trial, advise Judge Truman of what transpired?

A. I think we probably assumed, and this again, I'm not positive on, I think we assumed the testimony or whatever it happened to be would be transferred to Judge Truman by Judge Roylston, both the Roylstons, eventually.

Q. You made that assumption, Mr. Stevens?

A. Yes.

Q. But you never followed up with Judge Roylston to determine whether or not he had so advised Judge Truman, did you?

A. No, I did not.

Q. Did you ever contact the Bar Association and advise them of what transpired?

A. No, I did not.

Q. Now, Mr. Kashmar was the Public Defender at that time, was he not?

A. That's correct.

Q. Did you ever advise him of alleged wrong doings by one of his deputies?

A. Well, you are now going--trying to assume that its alleged wrong doings. We advised him of what had happened, yes.

Q. Well, your investigation proved to be fruitless?

A. No, the investigation proved to be inconclusive.

Q. Well, that's fruitless, is it not, sir?

A. Not sufficient evidence.

Q. Well, you weren't able to gain or acquire any evidence of Mr. Bolding's wrong doing, is that correct?

A. Can be answered yes.

Q. And this was a matter involving the wiring of a witness in a case in order to record conversations between that witness and a lawyer in the case?

A. That's correct.

Q. And after you were unable to acquire any evidence of wrong doing, you did not advise Mr. Bolding or his supervisor, Mr. Kashman--

A. That's not correct.

Q. Did you advise them?

A. Yes, we did.

Q. When?

A. Approximately two, three, four weeks after the trial.

Q. Who did you advise, sir?

A. Kashman.

Q. When, who so advised him?

A. I believe Dingeldine, myself, and possibly Rick Cooper. I don't know if he was there or not.

Q. You had a meeting with Kashman?

A. We did.

Q. Did you tell Kashman at that time that Hanrahan had been wired and that a but was placed on him and that in the course of conversations between Hanrahan and Bolding, that transmission of the conversation was being made to law enforcement officers.

A. I don't believe so.

Q. You didn't tell him about that at all, did you?

A. No.

Q. In fact, what you told him was that you had a tape from Hanrahan about allegations made against Bolding?

A. What we told him is what Han-

rahan had said to us on different occasions and what had happened on different occasions.

Q. You never made any report to Kashman of the bugging incident at all, did you?

A. I don't think we did.

Q. Let's get back to your decision to go ahead and wire Hanrahan. You say you arrived at this decision with Mr. Dingeldine and Mrs. Silver?

A. That's not what I said?

Q. Who arrived at that decision?

A. We determined from a recent case, I think it came out just before that, United States versus White, I think it is, about one person consenting, then there is no need for a search warrant, no need for legal action, if one person consents to it, but at the same time we were concerned about the possibility of a witness and an attorney, and that's why we went to Judge Roylston to find out if he felt it would be proper.

Q. When you say, we went to Judge Roylston, that's you and Mr. Dingeldine?

A. That's correct.

Q. And he told you that he thought

it was proper?

A. Yes, he did.

Q. And you then concluded that you were going to go ahead and do it?

A. That's correct.

May 1, 1973

[Pages 405-428]

MR. HOWARD: Nothing further, Your Honor. May Deputy Hill be excused?

MR. HIRSH: Subject to recall. I don't think we will need him, but I would like to have his number.

THE COURT: Subject to recall, you are excused. Please give your phone number and where you can be reached to the Clerk as you leave.

Would be mostly for in the morning because I don't think they'll need you again this afternoon.

We will take a short recess.

(RECESS)

MR. HOWARD: Call Sergeant Bunting.

LARRY BUNTING

having been called as a witness, was first duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. HOWARD:

Q. State your full name and occupation, please, for the record.

A. Larry Thomas Bunting, police sergeant, City of Tucson.

Q. How long have you been employed

in that capacity by the City of Tucson?

A. Almost thirteen years.

Q. And to what duties are you currently assigned?

A. I'm in charge of what is called the investigative support detail. Investigate all homicides, suicides, death cases.

Q. Calling your attention to May of 1971, what detail or what duties were you assigned at that time?

A. The same.

Q. Were you involved, in early May of 1971, in the investigation and subsequent trial of a case involving George Washington, Jr.?

A. Yes, sir.

Q. And briefly, what was the nature of that case?

A. Had to do with the murder of James Hemphill, the clerk at the Arizona Hotel in Tucson.

Q. During the course of your investigation in that case, or during the course of the trial of that case, did you at one time or another become aware of an individual by the name of James Anthony Hanrahan?

A. Yes, sir.

Q. And when was the first time that you became aware of James Anthony Hanrahan in relation to this particular case?

A. It was while the trial was in progress. As I recall, was on the evening of the 13th of May, '71.

Q. And how did you become aware of James Anthony Hanrahan, what called your attention to him?

A. A phone call from Mr. Cooper.

Q. And after this phone call from Mr. Cooper, what did you do?

A. I went to the Pima County Jail, or Pima County Sheriff's office, actually, where I met with Mr. Cooper and Detectives Mel Hill and Bud Davis of the Sheriff's office.

Q. And after meeting with these three other individuals, what did you--or at that meeting, what was the discussion?

A. This concerned a discussion Hill had had with Hanrahan earlier that day in the jail concerning the suspect, Washington. Hill stated that it was his understanding that Hanrahan was going to be a witness for Washington, and as I recall, something to the effect that Hanrahan stated that Washington wasn't the man

responsible and he was going to testify to that.

Q. Okay. Did you then speak with George--with James Anthony Hanrahan?

A. Yes, sir.

Q. And where did that occur?

A. This occurred in what is called the detective division in the Sheriff's office?

Q. And who else was present there?

A. Hanrahan, Hill, Davis, and myself.

Q. And where was Mr. Cooper at this time?

A. He didn't want to participate or get involved, so I don't know where he was.

Q. Where did you go, back into the jail to get Mr. Hanrahan, or who brought Mr. Hanrahan to the room, do you recall?

A. He was brought to the room. I don't recall who brought him.

Q. After he arrived in this room, did you have a discussion with Mr. Hanrahan concerning the case of State of Arizona versus George Washington, Jr.?

A. Yes, sir.

Q. Who did most of the questioning or discussing with Mr. Hanrahan concerning this case, yourself, Davis or Hill?

A. I did.

Q. And what was the nature of that

discussion, as close as you can recall?

A. As I recall, either Hill or Davis introduced me to him. They knew him previously, I did not, and explained that I was investigating the case which he was about to testify to. And I told him I was interested as to what he was testifying to, and he related that he was a resident at the Arizona Hotel when the murder occurred and that he was in his room and heard the blast and got up from shining his shoes, looked out his door and seen the suspect fleeing past him.

He stated it was a Negro male. He didn't know the subject. That he had bushy hair and that he was positive that George Washington was not the man who did it.

And that -- there was some discussion, I believe, on the length of the coat that the suspect had, and he said that the suspect had fled out the rear fire escape door from the second floor.

Q. And did you discuss this matter further with Mr. Hanrahan?

A. Yes, sir.

Q. What was the nature of the discussion from that point forward?

A. I explained to h'm that I had

investigated the case and that I was sure that there was another party involved, a small Mexican man by the name of Rodriguez, and that I hadn't located him yet and that eventually I would, and that probably, if I found out that he was not telling me the truth and perjuring himself, he could be in a bunch of trouble for perjury in a murder case.

And at that time he changed his story again.

Q. Then what was the story that he told at this point?

A. At this time he stated that he had, in fact, been in his room as he stated, and he was shining his shoes and he had heard the shotgun blast, got up and put his shirt on, looked out the door and seen the fire escape door close. That he did not really see a man. That actually he had gotten together with George Washington in the jail and discussed it briefly with him and then he had gotten, received a visitor--a visitor, an attorney whose name he didn't know, who had talked to him and agreed to make a deal with him. The deal was to be that he would testify that he had seen a person and he, although

he didn't know the person, that he was sure that the person was not George Washington.

Q. How did he refer to this attorney other than it being just an attorney?

A. As I recall, he stated he with a public defender, and later during the interview I asked for a description of him.

Q. Then when, in relation to what you have related to us here, was the tape recording made of Mr. Hanrahan's voice?

A. Approximately fifteen, twenty-five minutes after the introduction that I had talked with him, and then we went through the change in his story again. And then we took a taped statement from him.

Q. Show you what has been marked as Defense Exhibit A and ask you to examine that, if you will.

Does that bear any mark that you can recognize?

A. Yes, sir.

Q. Where is that?

A. Bears my initials, LTB.

Q. And is this the tape that we are referring to?

A. Yes, sir.

Q. The second story that Mr. Hanrahan related to you on the early evening of the

13th, the story that you--that is related to this tape recording?

A. Yes.

Q. Did you later have occasion to determine what attorney Mr. Hanrahan was talking about?

A. Not I, myself. I was told who the attorney was.

Q. Did you have occasion to determine whether or not Mr. Hanrahan was, in fact, staying at the Arizona Hotel at the time that the murder of Mr. Hemphill occurred?

A. Yes, sir. He was.

Q. During the course of your interview preceding the taping on the 13th of May, 1971, did you make any promises to James Anthony Hanrahan concerning his testifying or concerning giving a statement in the case of George Washington, Jr.?

A. No, sir.

Q. Did you threaten Mr. Hanrahan in any way during the course of this interview preceding the taped portion?

A. No, sir.

Q. Did anyone else in your presence, sir, promise anything to Mr. Hanrahan with regard to giving a statement in the case of George Washington, Jr.?

Q. Let me ask specifically, did Detective Davis, in your presence, threaten Mr. Hanrahan in any way or make any promises to him?

A. No, sir.

Q. How about Detective Hill, did he either threaten Mr. Hanrahan or make any promises to him with regard to making that taped statement?

A. No, sir.

Q. Had Detective Davis or Detective Mel Hill been involved in the investigation of the State of Arizona versus George Washington, Jr. case prior to this time, the 13th, 15th of May--13th of May, 1971?

A. No, sir.

Q. To your knowledge, did they know any of the facts of that particular case prior to this interview?

A. I don't know what facts they may have known.

Q. Did they, in this interview, discuss the facts of the case with Mr. Hanrahan or did--was it exclusively you discussing the facts in the case with Mr. Hanrahan?

A. I did practically all of the talking. I don't recall Davis or Hill saying hardly anything. I recall Davis just telling

him, calling him by name and just saying, be honest and tell the truth, urging him to be honest about it.

Q. After you had taken the taped portion of the interview, had tape recorded it, what occurred, what did you do?

A. Well, we left and got together with Mr. Dingeldine, and the tape was played to him. And then we called it quits for the evening.

Q. From that point forward, Sergeant Bunting, did you become involved in an investigation of Mr. Bolding with regard to what Mr. Hanrahan had said?

A. No, I didn't actively participate in the investigation.

Q. Why were you not involved directly in the investigation of Mr. Bolding?

A. Well, after we left we had some discussion, I believe in the presence of Mr. Dingeldine, and it was decided that the County Attorney's Office would be the investigating agency, and I wasn't particularly anxious to get the Police Department involved in that type of investigation.

Q. Did you, after this interview with Mr. Hanrahan, this original interview, did you ever have any other additional

interviews with Mr. Hanrahan concerning the case?

A. No, sir.

MR. HOWARD: No further questions at this time.

CROSS-EXAMINATION

BY MR. HIRSH:

Q. You have a report on this matter, Mr. Bunting?

A. No, sir.

Q. Where is your report?

A. I have no report, sir.

Q. You made no notes at all of this discussion you had with these people on May 13th?

A. That is correct.

Q. Why not, sir?

A. It was all on tape.

Q. Well, it wasn't all on tape, though.

A. The meat of the matter was on tape.

Q. Well isn't--Bud Davis tells us that you four were together for thirty minutes before that tape was made. Does that sound correct to you?

A. I don't recall how long we were together before.

Q. Could that be correct?

A. Could be.

Q. That was the sworn testimony here, that the four of you were together for thirty minutes before the tape was made?

A. I don't recall the time.

Q. You wouldn't disagree with what Bud Davis says in that regard?

A. I think thirty minutes is a little bit long. I wasn't watching my watch. I would say--I believe I stated fifteen to twenty minutes; twenty-five minutes.

Q. The tape is about five to seven minutes long, you got about seven minutes worth of tape that you recorded this particular evening.

A. Are you asking a question or making a statement sir?

Q. That's my question to you, isn't that about correct?

A. I didn't time it.

Q. Well, sir, what you are doing now is relying entirely on bare memory to tell us what happened for the, at least as you say, fifteen to twenty minutes prior to taking that taped statement?

A. That is correct.

Q. You would agree with me, sir, that it is a good police practice for a detective investigating a case to make notes in order to make a written memorial of the things

that transpired?

A. I would agree.

Q. That is a sound and accepted police practice, is it not?

A. It is.

Q. And it enables the detective or an investigating officer to have a memorial in order to enable him to have a record to testify at a later time, or to refresh his recollection at a later time?

A. That is correct.

Q. There were no notes of this made by any of the detectives, to your knowledge, during this time, prior to the time the tape was made.

A. I did not make any notes, no sir.

Q. Sir, you never heard of Jim Hanrahan prior to this time?

A. I had not.

Q. You had been outside the courtroom, or were you inside the courtroom during the, at least the first few days of this case?

A. I was outside.

Q. Were you the head officer on the case?

A. Yes.

Q. You knew that Washington's lawyer was Ed Bolding?

A. Yes, sir.

Q. You knew, when there was a statement made by Hanrahan that Washington's lawyer camd down and talked to him, that it was Ed Bolding, did you not?

A. He didn't know the man's name and I didn't know for sure it was Ed Bolding.

Q. Well, you certainly had a guess that it was Ed Bolding, did you not?

A. Yes. It was a guess, but not a fact.

Q. Well, let me ask you this, sir, did you have any discussion with any of those people as to what was going to be done or what should be done with respect to Bolding?

A. Yes, sir--wait who are you talking about now?

Q. I'm talking about the folks that were down at the Sheriff's department on May 13th.

A. You, and Mr. Cooper and--

Q. Yes, sir.

A. Yes, sir.

Q. Who participated in that discussion?

A. Cooper, Hill, and Davis and myself.

Q. Was Hanrahan sent back to the jail at that point?

A. Yes, sir. He was already gone.

Q. Tell us about the discussion you

already had.

A. Well, there was talk about what we were going to do with this particular situation, how it was going to be handled, who was going to make the investigation, was there enough evidence to substantiate the charge.

Q. Right then and there?

A. That is correct.

Q. What else did you talk about?

A. That is pretty much it, talking about why would Bolding do it and so forth?

Q. Did you talk about wiring Hanrahan up that night, was that part of the discussion?

A. I don't recall if that was discussed that night. I know at a later time he was wired.

Q. Well, do you recall any discussion with any prosecuting official, including investigators or members of the County Attorney's staff or Sheriff's Deputy, about wiring Hanrahan?

A. I don't recall that night, no.

Q. You don't recall ever hearing any such conversation?

A. I was present--I knew it was going to be done and who was doing it.

Q. Who told you about that?

A. I don't recall if--

Q. Cooper?

A. --Mr. Cooper told me, or who told me, I just knew that it was going to be done.

Q. Someone advised you that it was going to be done. You didn't participate in the decision making in that regard?

A. I may have participated in the decision making as to whether the police department was going to do it or the County Attorney was going to do it.

Q. Well, after Hanrahan gave you a taped statement, was he immediately sent back to the jail? In other words, is the termination of that tape that we heard, the tape that is at least marked for identification, did that terminate Hanrahan's conversation, or did you continue all of that, had further conversation with Hanrahan?

A. I believe there was a short conversation as, we'll be in touch with you later on.

Q. About what?

A. About what to do with, so forth.

Q. Who told Hanrahan that they would

be in touch with him?

A. I don't really recall that.

Q. Did you tell him that?

A. I may have.

Q. Why would you be in touch with him, sir?

A. Because I was interested in the case.

Q. In which case?

A. The murder case and also the case, the possible case involving Bolding.

Q. You mean you might participate in that case also?

A. I was considering it, yes.

Q. What else did you tell Hanrahan, or what else did Hanrahan tell you after the tape was terminated?

A. I don't recall any further conversation.

Q. Now, when did you check out to determine whether Hanrahan was, in fact, in the hotel, when did you do that?

A. I'm not sure. I believe it was the following day.

Q. And you found that he was?

A. Yes, sir.

Q. What else did you check out about what Hanrahan said, anything else?

A. That's all, as I recall.

Q. That is the sum and substance and total of what you checked out with respect to what he said, is that correct?

A. That is, to the best I can recall, yes, sir.

Q. Anybody ever suggest they give Hanrahan a lie test, was that ever suggested or talked about?

A. I don't believe that was talked about in my presence, sir.

Q. Well were prosecuting--you were the head man in the case?

A. Head Investigator.

Q. You were charged with the investigation culminating in the arrest and prosecution of this man, George Washington?

A. That's right.

Q. You weren't about to accept any statements by anybody that George Washington wasn't the man, isn't that a fact, when you think back on it, being candid about it and looking at your position, you weren't about to accept a statement from some con in the jail that George Washington was not the guy responsible for the commission of this crime?

A. Well, I wasn't about to accept it

without asking him about it.

Q. Well, what did you ask him, sir, other than tell him that it is a very serious offense to commit perjury in a homicide prosecution?

A. That is just about it.

Q. That is just about all you said. Did you tell him what the penalties for perjury were?

A. No, I don't even know what the penalty--

Q. You know it is time in the Arizona Penitentiary, means a stay behind bars?

A. I know. It is a felony, yes.

Q. How long does it take Hanrahan to tell you this story that, at least the first version, that Washington was not the man, three minutes?

A. Three or four minutes.

Q. That's the first thing he told you?

A. Right.

Q. Correct?

A. Yes, right.

Q. And then you proceed to tell him that someone else is involved in this?

A. That is correct.

Q. Did you ask Hanrahan whether he was involved in it?

A. That's correct.

Q. You had not even a suspicion that he was involved in the case other than the fact that he was at that hotel and now incarcerated at the Pima County Jail?

A. That's true.

Q. Isn't that true?

A. But it didn't violate anything to ask him if he was involved?

Q. Well, it did, sir, to intimidate him, because he got very nervous after that, didn't he?

A. He got nervous after I talked about perjury, yes.

Q. Got nervous after you asked him whether he was involved in this too, did he not?

A. After I had pointed out another possibility of a suspect, he got pretty nervous, yes, sir.

Q. Did you ask him whether he had a lawyer?

A. No, sir.

Q. Did you ask him--tell him that he had a right to a lawyer at the time of this interview?

A. No.

Q. Didn't discuss him having a lawyer

at all or representation for him at all?

A. No, sir.

Q. What else did you talk about during that fifteen to twenty-five minutes, Mr. Bunting, that you haven't told us about?

A. Well, after he told the second story the only additional thing I can recall that we talked about was, after he laid it out about the attorney, I told him I wanted to be very sure that he was telling the truth because you knew it could possibly jeopardize somebody's career.

I mean, that's kind of a serious thing to lay out.

Q. Why sure. Why didn't you give a lie test before you had that man wired, before, you, quote, jeopardized somebody's career?

A. As I said earlier, after this taped statement, Cooper, Hill, and us got together, and--

Q. To discuss what to do?

A. And decided that Tucson Police Department would not do the investigation.

Q. Mr. Bunting, you had all the facts available to you as to what happened in the homicide when you talked to Hanrahan that night, didn't you?

A. Yes, sir.

Q. And Hanrahan gave you one version,

you talked to him about perjury, you asked him whether he was involved and then you tell us the story changed?

A. That is correct.

Q. You talked to him about the facts as he told you; had the story changed, did he not?

A. I talked to him about the facts of the case,--

Q. Sure.

A. --people involved. Yes, sure.

Q. Sure. You discussed that with him before that taped statement was made--

A. Sure.

Q. --didn't you, and that was discussed in the presence of Hill and in the presence of Bud Davis?

A. Sure.

Q. And he would tell you something and you would say something about the facts?

A. No. It wasn't him saying, and me saying, no that is not right, it was, he told a story, I pointed out some facts. The stories switched around, and that is it.

Q. You pointed out some facts and you discussed this fact with Hanrahan, and finally when they were settled upon, you took

a taped statement from him and that is what happened, is it not?

A. After he said that this was the truth, we took a taped statement.

Q. After you and Hanrahan settled on the facts after you discussed the facts?

A. As he related them to me, yes, sir.

MR. HIRSH: That's all I have. Oh, just one question.

Q. (By Mr. Hirsh) Do you have any idea where these tape recordings of--involving Ed Bolding and Jim Hanrahan are?

A. Only tape I know about is that one over here.

Q. Well, you heard them, didn't you sir?

A. No, sir.

MR. HIRSH: Could I have a minute, please.

Q. (by Mr. Hirsh) You have no idea as to the whereabouts of these missing tape recordings where--when Hanrahan was bugged and transmitted the conversations between Bolding and himself?

A. I have never seen them. I have never had them. I don't know.

Q. Have no idea of their whereabouts

at this time?

A. No, sir.

MR. HIRSH: That's all I have, sir.

June 4, 1973

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"THE COURT: I have thought a lot about this case. I have read the memorandum filed by the defense. I didn't receive a memorandum from the County Attorney until this morning.

However, in listening to Mr. Howard's argument, I don't feel there is anything new in there that requires me to studie it.

So at this time I am going to grant the motion for a new trial on the grounds of violation of due process and newly discovered evidence."

* * * * * * * *

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

RELEVANT EXCERPTS

from the

HEARING ON WASHINGTON'S
MOTION TO DISMISS

November 26, 1974
December 2, 1974
December 4, 1974

November 26, 1974

[Page 22-23]

Q. [Mr. Bolding] All right. During that time, isn't it true that you, and in the presence of Mr. Cooper, indicated to me that Rodriguez was going to identify George Washington as being the man who did the job?

A. [Larry Bunting] No, I think what is confusing you is sometime after--during the motion for a new trial, sometime after, I remarked to you, on a number of occasions, next time, Ed, we are going to have a better case because I have located a witness; is that not correct?

Q. You probably have told me that kind of information, but what I am talking about is back at the time of the trial in 1971, May of 1971, and before--between December--between the preliminary hearing and May of 1971, is it your testimony that you did not tell me, indicate to me that Rodriguez was gone, but when you found him, he was going to identify George?

A. I don't recall.

Q. Do you deny that?

A. I don't really recall any conversation. I may have said it and I may

not have. There is--

Q. That's--

A. There is a number of times I talked to you when I really don't tell you the truth.

Q. Okay.

A. When I am not on the stand.

Q. All right.

MR. BOLDING: I think that is probably indicated by the testimony, and I have no other questions.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ENTIRE HEARING

on

WASHINGTON'S REQUEST FOR

WRIT OF HABEAS CORPUS

Before the

Honorable James A. Walsh

October 2, 1975

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR., Petitioner, vs. STATE OF ARIZONA, et al., Respondents.	NO. CIV 75-85 TUC (JAW) Tucson, Arizona October 2, 1975

TRANSCRIPT OF PROCEEDINGS

Before: The HONORABLE JAMES A. WALSH,
U.S. District Judge

(The clerk calls the case.)

THE COURT: Good morning, gentlemen.

MR. BOLDING: Good morning, Your Honor. Are you ready for me? Did you have something -- I thought that you were about to say something else.

THE COURT: No, I was not going to. I have already mentioned to Mr. Butler that I don't have here, in what was brought over, sent over from the clerk's office, the testimony of Jon R. Cooper on the motion to dismiss, December 2nd and 4th, 1974, and he had given me or phoned over a mention of three parts of the record that he wanted my attention directed to, and among them was this transcript of Jon R. Cooper's testimony, and it isn't here.

MR. BUTLER: Judge, after we leave here this morning, I will secure a copy of that testimony, either the original or a copy and Xerox whatever I have and bring it over.

MR. BOLDING: I have the transcript also, Your Honor, which I could leave, or I have some copies.

THE COURT: Well, I will let counsel

proceed as they feel they want to in this matter now.

MR. BOLDING: Thank you, Your Honor. As Mr. Butler and I have discussed already this morning, this is somewhat of a rehashing insofar as we are concerned because we have been here before, not to this Court, but this type of argument has been made with the Arizona Supreme Court, and so I may skip over some thing that might be of importance to this Court. I hope not. But in my remembering, I may feel, well, I have said this to you before.

What we are asking for, Your Honor, is specifically set out in our motion, in our application for the writ. We feel that just plain and simply out of a need for fairness to Mr. Washington that this writ, this application should be granted and Mr. Washington, the charges against him should be dismissed.

He is still in the Pima County Jail where he has been since January 8, 1971, all without due process, in that he has never been fairly convicted, never been convicted with the use of all evidence available, with the use of evidence that

should have been given to George and his lawyer at the time of the first trial, and this is all basically that we are asking for, that justice be done and that fairness prevail.

The Court, from reading the memos, I know, has put together the chronology of the incident, and I will need to refer to it a little bit in talking with you this morning, or in asking you for the relief that we feel we are entitled to.

James Hemphill was shot in December of 1970. The testimony from the previous trial which was held in about May of 1971 will show or did show that on the night that James Hemphill was shot, George Washington, Jr., was taken into custody, on that very night. He was arrested close by the scene, about an hour after the shooting. He was taken to the police station. He was subjected to a one-man showup with one of the witnesses. The eyewitness said, "No, that's not the man." George was released.

Later in January he was picked up in Yuma on another charge of some sort. His brother and his brother-in-law and his sister -- well, his brother-in-law and his

sister were in jail also at the same time, and in response, we maintain for a trade-out agreement, the brother-in-law and sister's charges were dismissed and they testified that George had told them that he had done a shooting in Tucson.

George maintains that that's not what happened, but at least that was the testimony that the jury heard.

The testimony of the other eyewitnesses to the incident was pertinent to the case. Both of the eyewitnesses that were identified at that time as being eyewitnesses, Your Honor, said that this was not the man, in essence. We weren't favored by the prosecutor, Your Honor, with the testimony of what turned out to be the third eyewitness, and that was a Mr. Hanrahan.

Unknown to me, unknown to George's counsel at the time, Mr. Hanrahan was evidently working both sides of the street. I was called to the jail, or my attention was directed to Mr. Hanrahan by Mr. Washington during the trial. I visited Mr. Hanrahan at the jail. He advised me, he gave me a version of what had happened at the hotel on that night, and then he immediately notified the police department or

the detectives who were working the case.

At that time he told -- and the evidence is clear on this -- he told the detectives who were working the case that he was a witness in the hotel shooting and that Mr. Washington was not the man who did the shooting.

There was quite a bit more conversation, needless to say, between Mr. Hanrahan and the police department, and the detectives working the case, and that culminated in Mr. Hanrahan's agreeing -- he says in response to the police department's request-- agreeing to "bust Bolding" and not testify in the trial. He agreed, then, at the request of the County Attorney's office and the police department to being wired up with a transmitter. He agreed then to contact Washington's defense counsel and to get him down to the jail, and that was me.

At the jail, in the presence of Mr. Fred Kay and myself, Mr. Hanrahan told again about the incident at the Arizona Hotel. This transmission, unknown to me and to Mr. Kay, this interview was being transmitted to a recorder in the Pima County Jail. The recording evidently didn't

do too well, because Mr. Hanrahan was later wired up again with a transmitter and sent to the Pima County Courthouse in the custody of the sheriff.

Mr. Hanrahan was seated outside the courtroom where the trial of Mr. Washington was in progress. At a recess, I exited the courtroom and saw Mr. Hanrahan sitting there. Thinking that he was probably going to be a witness for the defense all along, and knowing that the State was still in its case, I had some wonderment as to why he was there.

I asked him why he was there, and he said, well, he didn't know, he was just looking for a deal. I told him that I was not the person that could make a deal, but that Mr. Cooper the prosecutor was the one who could make a deal. I asked him further if he was going to testify, and he said, "Well, I don't know," and my words to him were -- and I used uncouth language at that time -- I said, "Well, you son of a bitch, if you testify, you better tell the truth."

Well, I didn't know at that time that my words were being transmitted not only to a recorder in the courtroom adja-

cent but also were being transmitted via the wireless transmitter to the office of the Pima County Attorney where Mr. Stevens, the chief criminal deputy, and five or six other deputy county attorney's were listening to the transmission, and some of the investigators. That was not discovered until nearly two years later, a year later, year and a half later.

In the interim, the tape recording somehow became lost by the Pima County Attorney's office. In the interim, Mr. Stevens and Mr. Dingeldine, the deputies, contacted Mr. Kashman, who was the Pima County Public Defender at that time, and advised Mr. Kashman that I, Ed Bolding, was involved in attempting to suborn perjury.

There was never any conversation with Mr. Kashman or with me that Mr. Hanrahan had in fact confirmed in his first conversation with the police department that Washington had not done the shooting. There was never any transmission to Mr. Kashman or to me that the recordings were made of the conversations that I had with Mr. Hanrahan. There was never any trans-

mission made to Mr. Kashman or to me that these recordings were completely exculpatory insofar as Bolding was concerned and Hanrahan. Only the accusation that I had been involved in attempting to suborn perjury.

I discovered this, Your Honor, as I state, about a year and a half later, after an appeal had been filed, after Mr. Washington had been convicted, after the appeal had been filed and there was a motion for a new trial.

That motion for new trial was granted on June 4th, 1973, based solely on the fact that Hanrahan had made the statement to the law enforcement officials that Washington did not do this, in essence, and that that statement had never been divulged to Washington or his counsel at that time as required by the Brady doctrine.

The County Attorney at that time then filed an appeal in behalf of the State appealing the ruling of Judge Truman granting the new trial. The matter sat with the Arizona Supreme Court from June 4th of 1973 until June 20th of 1974, at which time the new trial order was affirmed.

There was an additional appeal by the State in the way of a motion for rehearing. Finally in September of 74 the motion for rehearing was denied.

This information was not divulged, Your Honor, even in the face of a Brady motion being filed by defense counsel asking for any and all exculpatory or beneficial material. It was never divulged voluntarily. It had to come by investigative work by myself.

In November of 1974 we filed in behalf of Mr. Washington a motion to dismiss. That was based, Your Honor, on the previous facts of Mr. Hanrahan's talk to the Court and to me and his testimony that was given in regard to the new evidence. It was based on that and it was based on the fact that the County Attorney of Pima County had never divulged to defense counsel the exhibits which we listed and numbered A through X, or whatever the numbers are, those that were attached, and I have a spare copy in case those didn't get attached. Those items, Your Honor, have information covered in the appendix to my application here, those items were never willingly divulged by the County

Attorney, either.

Early in October, I believe it was, I copied the Brady motion that had been filed back in January of '71. I just copied it and changed the dates and filed that. The County Attorney filed his response to that Brady motion and in essence copied the response of the first Brady motion, saying again, to add insult to injury, saying again that there was no Brady material in his file.

Upon the in camera inspection by Judge Truman, the items that we have attached here, the several police reports of various sorts, were ordered to be divulged. Those items, Your Honor, included a written statement from a witness, Alonzo Rodriguez, a signed statement which talks about the fact that the man who did the shooting was a Mexican man, was a Spanish-speaking man. In other statements to the police officers, the statement was made that he was a light-complected man. In other statements, he was -- he made the statement, the witness made the statement that he was positive that the killer spoke with a Spanish accent and is positive the suspect is Spanish.

That other information in regard to statements from other witness that the killer had driven off in a 1959 Mercury automobile, that was never divulged. None of these statements were divulged at any time, and counsel was not aware of any of those statements.

The prosecutor -- and I believe the testimony that you will see from the motion to dismiss transcript -- I believe the testimony of Mr. Cooper, the prosecutor at that time, is really unbelievable. The prosecutor, Mr. Cooper, states that as of this time, right now, that those items are not covered under the Brady doctrine and are not discoverable by the defense. He maintains and his statements are "there were no Brady violations. I could see no detrimental result to Mr. Washington by not divulging this information. I don't believe these statements were favorable to George Washington," by the prosecutor's statements.

There is not another prosecutor in this state, Your Honor, who believes that. I submit that Mr. Butler, who has been assigned to argue this case, does it out of a sense of advocacy, as opposed to a sense

of believing that Mr. Cooper really believes that these items were not discoverable under the Brady doctrine.

There was either gross negligence or willful, intentional suppression, Your Honor, of all these items on the part of the prosecutor.

This prosecutor, Mr. Cooper, was guilty of misconduct. Mr. Stevens is guilty of misconduct. Mr. Dingeldine is guilty of misconduct. The County Attorney's office at that time prosecuting this case willfully and intentionally in an attempt to do something, get a conviction or to bust the lawyer for the defendant, for some reason they engaged in a conscious, willful course of conduct which denied to Mr. Washington the fair trial that he was entitled to.

The prosecutor makes the contention now that, well, it doesn't make any difference because the witness, Mr. Rodriguez, has recanted, and the witness Mr. Rodriguez has now become a suspect or was a suspect at that time, and that's why this information was not divulged. Lots of reasons were given, none of them valid, as to why

the information was not given. It's just a matter of fact that the County Attorney's hand got caught in the cookie jar and he's having to try to make some explanation as to why he willfully, intentionally and maliciously withheld the information that he did.

And I don't make those charges lightly, Your Honor. They are in the record. They are available --

THE COURT: I have a recollection that in your closing argument in the trial that you refer to the Rodriguez statements.

MR. BOLDING: I did, Your Honor, I referred to a light-complected -- at the time of trial, I got one statement, a portion of one statement, that said something about the fact that he was light-complected, Mexican or Negro. These statements were not ever divulged. The testimony is, as the Court will note from the record, that not only did I make a Brady motion to obtain all of the statements that were never divulged, but I also talked with the prosecutor, also talked with the chief detective, and both of them lied about Mr. Rodriguez to defense counsel, and they do not deny that. In fact, Sergeant Bunting,

in his testimony on the motion to dismiss, states, "There is a number of times when I talk to you when I really don't tell you the truth when I'm not on the witness stand."

Specific requests were made by me of the County Attirney at that time, Mr. Cooper, and of the chief detective for information about Mr. Rodriguez, They assured me, "Oh, we don't have anything. We don't have any way of knowing what he's going to say, except he is going to identify your man as being the killer," when that simply was not the case at the time in January of 1971 or in May of 1971 or at any time up until October of 1974, never.

So I did refer to it just as a matter of grasping at straws. I referred to a portion of one statement that I was able to finagle some way from the County Attorney during the trial. But never at any time were the remainder of these statements given to defense counsel.

The prosecutor has prepared a chart stating about these original statements, Rodriguez' original statements to the police, Rodriguez' involvement with the

crime, all of those, and saying, "Well, he knew about it. Bolding knew about it because it was mentioned at the preliminary hearing."

Sure, it was mentioned at the preliminary hearing, and then I made a Brady motion to try to obtain any statements, and the prosecutor assured me there were none. I made a Brady motion, and the chief detective assured me there were no such items. Those statements that are made in this particular table talk about the preliminary hearing, talk about the tact that Rodriguez' possible involvement in the crime or an interview with Rodriguez was talked about at the preliminary hearing, and, yes, his name was mentioned at the preliminary hearing, and that's clearly why I had any interest in making a Brady motion, why I had any interest in making a specific request of the County Attorney and the detective and then was lied to.

And then the prosecutor stood up in court and said, "There are no items in my file which would be of benefit to Mr. Bolding or to Mr. Washington," and that's in the transcript, Your Honor, of the

hearing on my motion for production of items under the Brady doctrine.

It's clear as a bell Mr. Cooper is standing there lying to the Court and saying, "We don't have anything in our file that would help this defendant." I did all that I could. I made my Brady motion. I pursued it as hard as I could pursue it and met with a blank wall, with a dead-end street, and was just able to try to wing it in court and try to mention the fact that somebody talked about light-complected or Mexican. And if the Court would read my argument, you will see that I was winging it at that time, based on the fact that there was no information like this in the County Attorney's file.

Okay. These items, we maintain, Your Honor, should have been divulged. Okay. We got our new trial. That's been ordered. We finally, after the appeals by the State, it was finally affirmed and we have our new trial, and that's what we start and that's our third complaint here, in regard to the mistrial that was declared in January of this year. We got our new trial, Your Honor, but that's

not really what we are after.

We are after a dismissal in this case, because there was a gross calculated misconduct on the part of the County Attorney.

Because here, four years later when we finally got our new trial, times have changed, witnesses' memories have dimmed, there are many problems that have arisen that would not have been present had this information been divulged to me or to Mr. Washington in January of 1971 before the first trial in this particular case.

Now, what do we have? We have Mr. Hanrahan who has now, it's my understanding, been convicted of a felony in California and is in the California prison, as far as I know. I just got that information secondhand. Maybe he's out by now. But I believe that he has been convicted. Obviously that hurts his credibility in front of a jury for me to have to present him at this time as a felon in prison in California at a trial. That's a hard thing for me to have to do.

So that circumstance certainly has changed, Your Honor, which would not have been the case in January, February, March,

April, May of 1971, because Mr. Hanrahan at that time was incarcerated in the Pima County Jail and had not been convicted of the crime, either of the crimes with which he was charged. He was being held awaiting trial.

He was subsequently convicted of a charge here, was given probation as a trade, as the deal by the probation office here in Pima County.

The County Attorney, Mr. Cooper, and two detectives went to the probation office here and in confirmation of what I am saying was the deal told the probation officer that this man has been very helpful in the George Washington case and we want you to give him probation. Well, they can't deny that, either, because that happened, and the helpfulness was the fact that he didn't testify in the trial and the fact that he wired himself up to help us counsel for the defendant, unsuccessfully.

Now, then, the circumstances have now changed in regard to Mr. Rodriguez. Mr. Rodriguez made five or six different statements at the time, none of which were divulged, that the man did not do the

shooting. Now, that version has changed. That version has changed because of a trip made by Mr. Bunting when he saw that the trial was going to take place sometime shortly after October of 1974. Sergeant Bunting made a trip to Kansas to talk with Mr. Rodriguez. Evidently he had no trouble in finding him at that particular point when it became apparent the trial was going to take place.

Sergenat Bunting's testimony is recorded in some of these transcripts, Your Honor, in regard to the motion to dismiss, and I think that's very enlightening testimony in and of itself. Sergeant Bunting went to Kansas and talked with Mr. Rodriguez, and by his own admission Mr. Rodriguez, for the first six or seven minutes of the conversation, maintained the same version of the situation as he had back in 1971, or 1970 when the police department was talking to him at that time: Spanish-speaking person, light-complected, that kind of conversation.

Mr. Washington being black as your robe, Your Honor, simply didn't fit into that description at all.

The conversation continued with Sergeant Bunting at that point pulling out a picture of Mr. Washington -- and we acknowledge it was a picture of Mr. Washington, complete with mustache -- and Sergeant Bunting told Mr. Rodriguez, "Look,we have already got this man. He has already been convicted of the crime," and the testimony is a little hazy at this point, but something to the effect that he has already been convicted and he is coming back to trial, and that type of testimony, and that we have enough on you to where we can nail you with this crime also.

At that point, Mr. Rodriguez, pointing to the picture, says, "Oh, yeah, okay, that's the man, except the man that did the shooting, that man didn't have a mustache at the time," and Rodriguez then went on to tell Sergeant Bunting how he had spent the day with the man who later committed the crime and how the man didn't have a mustache, and Rodriguez maintains to this day that the man who committed the shooting did not have a mustache, after spending some eight hours with him on the day of the shooting.

Mr. Washington -- and I think it will be conceded by the prosecutor -- had a mustache at the time he was picked up in December of 1970, that he has had a mustache ever since. All of his pictures show a mustache.

And so I think that that's interesting by itself that Sergeant Bunting would be able to, number one, put his finger on Mr. Rodriguez just after a trial setting, within two weeks after a trial setting was made in this particular case and, number two, that Mr. Rodriguez would maintain the same story to him until he was told that a person had been convicted of the crime already and shown a picture and states, "Oh, yeah, whoever that guy is --" didn't even know his name, and had no idea of the name -- "whoever, that's the guy that did the shooting, but he didn't have a mustache at the time." Just very ironic and very interesting testimony, and that's covered in the motion to dismiss transcript.

So there is no way to put us back to January of 1971, to May of 1971 when the testimony from Rodriguez could very well have cleared Mr. Washington. And in fact the Arizona Supreme Court, Your Honor, even recognizes that in its ruling on the

motion for new trial.

Case No. 2408-2, Memorandum Decision, State of Arizona versus George Washington, Jr., states, "There is no evidence more valuable to a defendant than the testimony of an eyewitness that he did not commit the crime in question. The prosecution has an affirmative obligation to assure that a defendant receives a fair trial. The suppression of evidence was clearly prejudicial to the defendant and a new trial was warranted."

Underlined by the Court, another rule in effect, in regard to Rule 310, Arizona Rules of Criminal Procedure, "New and material evidence --" and here underlined by the Court, emphasis added -- "which if introduced at the trial would probably have changed the verdict or finding of the court --" the Arizona Supreme Court is recognizing that just Hanrahan's testimony by itself would probably have changed the verdict or finding of the court had it been presented, Your Honor, in May of 1971. We can't go back to that date. The circumstances have changed.

Hanrahan's situation has changed, and we can't say now, as a matter of fact, that that testimony would probably change the verdict.

Had Mr. Rodriguez been made available to us or his name or his statements or something, that would have given counsel a reason to want to go after him and try to find him; and had he been found at that time, had his testimony been made available in May of 1971, surely that testimony plus the testimony of Hanrahan would have changed the verdict.

Now we can't go back to that now, and that's what I'm complaining about. We have our new trial, but that doesn't do Mr. Washington any good and that doesn't take away the gross negligence or the calculated, intentional, willful misconduct of the County Attorney at that time. It doesn't take away the fact that he was denied his fair trial. It doesn't take away the fact that we can't go back there and have a trial under the same circumstances before the same jury that Mr. Washington was entitled to have determine

his guilt, and it just can't be now, and it just doesn't help us now to say, "Okay, come on back now and let's do your new trial one more time."

The prosecutor has cases which say, "Well, new trial is all that's ever been granted in this type of an area. New trial is all that's needed to be done to cure this mistake, even if there was a mistake, and even if there were excesses," to use the County Attorney's statement -- which is certainly an understatement -- and we feel that the law should be, whether it is or not, that this type of action cannot be condoned.

We have cited to the Court the line of cases -- Arizona case State v. Ballinger, and the line of cases, a Pennsylvania case, an Alaska case, a Third Circuit case, Fourth Circuit case -- which talk about the deliberate and intentional misconduct on the part of the prosecutor. Now, true, in the Ballinger case, there was deliberate or intentional misconduct, as it was determined to be, during the trial. It made the defense move for a mistrial. It was held that he couldn't be reprosecuted.

There is no difference in our case.

Had this information come to defense counsel's attention during the trial, obviously there would have been a mistrial granted, moved for and granted. It's plain, it's obvious that that's what would have happened.

Now we are saying, since the prosecutor did his misconduct, did his dirty deeds and hid all of this from the defendant, now, then, because we have already been through that trial, wasn't a mistrial, now, then, that misconduct, deliberate and intentional misconduct, is going to be grounds for nothing more than just a new trial.

We submit that that's not the fairness doctrine and that's not the type of action that should be allowed in our courts. We say that the jeopardy clause does prevent a retrial and it's just out of a sense of fairness to the defendant and out of a sense of the fact that this is the type of thing that the courts have traditionally frowned upon, looked down upon and criticized prosecutors for.

But this is the type of case that's just never simply been totally decided in this circuit, but Mr. Butler tells me there is a Seventh Circuit case of some sort that I will let him argue about, Seventh or Eighth Circuit.

Without knowing what the facts in that case are, the facts in this case are that Mr. Washington can never be put back in the same shape that he was in May of 1971 at this particular trial that he had, at this unfair particular trial that was afforded him, at this trial that was afforded him without full benefit of the information that the prosecutor was obligated under his duty and under his sense of justice to divulge to us.

Now I cringe for other people who might have been prosecuted by this particular same prosecutor if he doesn't know the difference or if he doesn't know the Brady doctrine. How many people have wrongfully been prosecuted already? Here's one already. I don't know. Here's one for sure. I don't know how many more there are, but I would submit that there are several.

We have also asked Your Honor, in addition to dismissal based on the

jeopardy provision, we have asked dismissal on the speedy trial provision, for lack of a speedy trial provision, for lack of a speedy trial, and Mr. Butler says, or the prosecutor, whoever prepared this answer, said, "Well, that doesn't apply. It just doesn't apply, because look who caused all this delay. Well, George Washington caused all this delay by appealing that conviction."

Well, now, how was the conviction obtained? The conviction was obtained only by lack of use of fair evidence, according to the Supreme Court of Arizona, which prejudiced him in his defense of his case, eyewitness information, no more valuable information.

So there was a confiction because the prosecutor did not divulge this information.

Now he is saying, well, now, we can't worry about a speedy trial, because he was appealing --

THE COURT: Mr. Bolding, doesn't that argument assume an outcome of the trial if the evidence had been made available to you?

MR. BOLDING: Yes, Your Honor, it does.

THE COURT: I think that's a little too much. I mean nobody could prognosticate that if Hanrahan's name had been given, that the outcome of the trial would have been different, because apparently Hanrahan is a guy that worked both sides of the street, as you put it, sucked in the prosecutor and then he sucked you in, and you both took him in good faith, I would have to assume.

MR. BOLDING: I would differ only with that last statement, Your Honor.

THE COURT: Well, I don't think you differ with my assumption that you took him in good faith.

MR. BOLDING: No, I wouldn't differ from that.

THE COURT: I think this is the most unfortunate thing that happened in the case, and I think it's been, in a sense, something that's colored it or affected or influenced it all the way through from the time that Hanrahan got into the act and worked both sides of the street.

MR. BOLDING: Your Honor, I agree, it has influenced. I do differ in the good

faith aspect of the County Attorney, because they knew at the time that Hanrahan said, "Washington didn't do it," and then they made him the deal, and then they wired him up and then they followed through with the deal by recommending probation.

So I agree it's colored the case all the way through, but I don't think that that's any more important, Your Honor. In my opinion, that's certainly not any more important than all of the statements from Rodriguez that were tucked in the back pocket of the prosecutor and not divulged. Certainly that's information that is critical to the case and was at that time. And it couldn't have been any more clear that that type of evidence is the type of evidence that if anything would clear Mr. Washington, that type of evidence would.

And again I have to state that the Arizona Supreme Court outlined on their own that the evidence if introduced at trial would probably have changed the verdict or finding of the Court. I think the Arizona Supreme Court has accurately

assessed the situation, in that it probably would have -- and we can't say that it would have for positive. It should have. We can't say it would have, but probably would have. Probably this type of testimony would have changed the verdict, and that's what the Arizona Supreme Court was interested in and was emphasizing.

But, Your Honor, the fact of the speedy trial, the four factors of Barker v. Wingo are certainly there, and they are all attributable to the State. They are all attributable to the State because of the lack of divulging of the fair information that they had in their possession which they didn't give. The length of the delay, the reason for the delay, all of those are directly attributable to the fact there was a conviction.

Then the prejudice, now, the prosecutor in his answer skips over the fact of this prejudice situation. How much prejudice was done to the defense in this case? I can't find that they are saying that there was not any prejudice, because it's a matter of fact that there was prejudice here. They state that Washington was responsible for 63 percent of the

total time that elapsed after his conviction. Well, he was responsible only because the evidence was not produced that could have cleared him.

THE COURT: Well, couldn't you make that same argument about any case that is reversed? In other words, that there has been a delay in trial, an inordinate delay in trial, violation of constitutional rights, because if the prosecutor hadn't stumbled and erred, the case wouldn't have been delayed so long?

MR. BOLDING: Yes, Your Honor, that could be made, but I could not personally get up here and with the same conviction make that same argument to this Court where there was an error, where there was negligence odn the part of the prosecutor, where there was an error on the part of the Court in trying the case, a real misinterpretation of what happened, a real misinterpretation of the law. I couldn't with the same conviction argue that.

But where there is by the evidence, by all of the testimony, a deliberate and conscious misconduct on the part of the State, Your Honor, who is charged with fairness in this area, I can make that

argument with conviction, because here it's just as if Mr. Cooper had started off saying, "Well, we are going to nail Bolding and in the process we are going to get Washington, too," and then he tried to do it and he was successful in one and not successful in the other, and it was misconduct and it was gross, and from all of the testimony that -- I guess I should have put on some expert testimony at one of these motions to dismiss, picked a name out of the hat of any attorney that has ever practiced criminal law and asked his opinion as to this hiding and this suppression of the evidence. There is not a one that would say that it was fair. There is not a one that would say that the prosecutor shouldn't have known better. There is not a one of them that would say it was just something he overlooked, because he calculatedly went in and omitted to tell about Hanrahan's first statement, calculatedly went in and wired him up with the transmitter and calculatedly hid the evidence about Rodriguez. It's just there.

He is either totally devoid of knowledge or it's a calculated suppression of the evidence, and I don't know which way this prosecutor, Mr. Butler, will argue insofar

as Mr. Cooper is concerned at this time, but it has to be one way or the other.

THE COURT: Well, let me ask you this: At the same time that Mr. Cooper is, as you say, secret, you were in fact with Hanrahan?

MR. BOLDING: No -- oh, I'm sorry, yes.

THE COURT: Weren't you down there talking to him? Isn't this the way it started?

MR. BOLDING: Yes, that's correct.

THE COURT: He was telling you he knew something about the thing, so you did know Hanrahan was there.

MR. BOLDING: Yes, I did.

THE COURT: And what did he tell you? Did he tell you he was in there and this thing never happened?

MR. BOLDING: Well, my testimony is in here also, Your Honor, and I hate to paraphrase my testimony, but essentially what he had told me on the first visit down there was that he didn't want to get involved and he was looking for a lawyer in his case and he was looking for a deal in his case, and I told him I could make no deal, I was with the Public Defender's office at that time, would try to see that he had an attorney representing him on a case that

he had. We were representing him, the Pima County Public Defender's office was, was representing him on one case. He didn't have an attorney on the other case.

I told him I would try to see that he had an attorney. I asked him about the incident -- and I didn't refresh my memory on that. I don't think I really need to -- but he talked about the fact he saw a man run by his door, heard a shooting and saw a man run by his door. It looked like the man had on a long coat, looked like he was bigger than Washington, that kind of testimony.

The second time I went down there with Mr. Kay, he told the same version except he placed him back a little closer to his door. Then my third conversation with him was at the courthouse during the State's case when he was brought to the courthouse. Well, you know I have had enough trials and had enough experience to know that when the prosecutor brings somebody down there to testify and sets him outside, probably he is not going to help me a whole lot, and so thinking that, I made my inquiry of him what he was looking for and what he was doing. Turns

out that he was looking for me to try to make him a deal, for me to say, "Okay, if you won't testify, I'll give you a hundred bucks, or if you don't testify I'll do something." That's what he was wanting me to say, because that's what he was instructed by the law enforcement officials to try to get me to do.

THE COURT: Well, if you won't testify? I thought this statement as far as he made to you was favorable, that this man was bigger than Washington.

MR. BOLDING: It was generally favorable, but what the reversal came from and the new trial that Judge Truman granted and the Arizona Supreme Court affirmed came on the same basis that he had told the law enforcement officials that this man did not do it. He had never told me that. He was generally favorable and he was then, after the law enforcement officials got in the act, then he was playing both sides and he wasn't being candid with me and he was trying to set me up, so he later had a change of heart, a year and a half later, and broke down and confessed to me and an investigator from my office that I was the only one that had

been halfway decent to him and he wanted to tell me the truth about the situation, and then all this came out, and that's where it all came from.

But at the time, I did not have the benefit of that testimony, of the fact that he said, "I saw the shooting." Now, Hanrahan's testimony is, "I was standing there at the scene of the crime, I saw the man pull the trigger and it was not Washington." To me, he was saying, "Well, I just saw him through the hallway there," or something similar to that type of testimony.

THE COURT: Well, he is evidently a witness that if either side calls him the other side has plenty of ammunition for cross-examination.

MR. BOLDING: Your Honor, I would say that he is probably subject to impeachment from either side, at this time. But I'm trying to put our minds back to the time of the original trial, in May of 1971. What would it have been at that time if the prosecutor had said, "Hey, Bolding, this guy says he saw the shooter, saw the guy that did the killing and it was not Washington. I don't believe him but I'm obligated under the Brady doctrine, under the

United States Supreme Court decisions, I'm obligated to tell you that. And besides that, I have got statements in my file that tell you in six different statements that the guy that did the shooting was a Mexican, was a Spanish-speaking person, six different statements along that line. I have got evidence in here that the killer left in a 1959 Mercury. I have got evidence in here that shows that a man fitting the description of the killer was picked up in Flagstaff, Arizona, and released because we just didn't think it was him."

No follow-up was done on that at all. Nothing was done. That was not divulged to me, all of these things. If that would have happened in April of 1971 before the trial in May of 1971, certainly this Court would have to agree that there would have been a different trial. I mean it may have come to the result, but it may not have, and the Arizona Supreme Court says probably would not have. In my opinion, that's what they are saying. Certainly the trial would have been different.

Now, then, five years later how can it be? Because we have totally different

circumstances now than we had then, and all of those circumstances -- again I'm a broken record here, Your Honor, but I attribute them all to the intentional misconduct of the County Attorney, and again I feel that the speedy trial issue is one that is important and can fit very well in this particular case.

Our third contention, Your Honor, is in regard to the mistrial which was granted by Judge Buchanan in January of this year. The prosecutor, who was Mr. Butler in this particular case, Your Honor, talked about the four-year period of time, repeatedly talked about the four-year period of time between the time James Hemphill died and the date of the trial. He made reference to the fact that many of the witnesses who were to be heard by the jury had already testified "in at least two other proceedings." He also stated and inferred that a magistrate had conducted a preliminary hearing in this particular case and had made findings, inferred that findings were made against the defendant. That's at page 50.

We objected to all of those statements, Your Honor, and asked that a mistrial

be granted at that particular point. Those requests were denied.

I therefore treated Mr. Butler's feelings and words and actions as the law of the case, as I am entitled to do, and I explained what the two prior proceedings were. During my opening statement I made reference to the former trial in one form or another on no less than about eight occasions. I didn't count how many times Mr. Butler in his opening argument mentioned the former trial or that type of testimony that would be forthcoming. I did make the statement that for the reasons already presented, because of prosecutorial misconduct, that the Arizona Supreme Court had granted a new trial. Never any objection, ever, to any of the statements that I made. The only objections that were made came from my side of the bench, objections to the prosecutor's pursuing this particular line.

I went on. I continued for another minute after I talked about the granting of the new trial. After coming back from noon recess -- there was a recess for lunch, and after that, then, Mr. Butler moved for a mistrial based upon the mention by me of

the Arizona Supreme Court decision. That mistrial was denied, motion for mistrial was denied. I was ordered not to introduce the opinion without presenting authority for its admission, and I agreed to follow that order and agreed to furnish the Court with some type of authority before I could present the ruling by the Supreme Court, which I intended to offer at that time.

The trial continued. Two witnesses gave testimony, and then the motion for mistrial was renewed the next day, based on what I would call old Rule 314 of the Arizona Rules of Criminal Procedure. This was the only reliance that the Court made to any authority that was ever cited to the Court. Judge Buchanan said that the only thing that he was concerned about in the motion for new trial was the fact that Rule 314 was there.

Well, Rule 314 talks about the fact that there should be no mention of the finding or verdict of the previous trial. Okay. The finding or verdict of the previous trial was one of guilty. Twelve people said that George Washington was guilty. That's the reason it's a protective -- it's a defense protective rule, Your Honor,

and that's the reason we have the rule. The United States Supreme Court has said that's the reason we have the rule, in the case of Hunt vs. Utah. The United States Supreme Court in interpreting a rule just exactly like Rule 314 of the Arizona rules states that this is the reason that a prosecutor can't go in there and tell a new jury,"Look, twelve other people convicted this guy and now you have got to do the same thing." That's the reason for the rule, and that's what the United States Supreme Court said.

Notwithstanding that, and unknown to either Mr. Butler, the prosecutor, or the Judge or the defense counsel, me at that time, unknown to us, Rule 314 was held to be unconstitutional by the Arizona Supreme Court. The new Rules of Criminal Procedure have omitted the old Rule 314 because it is unconstitutional in at least its first and last sentences, and certainly we did not violate the second sentence when we talked to the jury.

Okay, number one, the rule is protective of the defendant who can probably waive it if he wants to go in and say to the jury, "Look, this guy was previously convicted," which I happened to have chosen

to do in light of Mr. Butler's continued statements in regard to the previous proceedings, prior proceedings,recorded testimony in that type of situation.

Not only can I waive it, but also it's been held to be unconstitutional. The Court cannot rely on a previously held unconstitutional rule as authority for a judicial decision. The validity of the granting of a motion is in question simply because of that. The prosecutor is going to say, well, manifest necessity, public justice, all of those things required a mistrial.

There was never ever during my argument, during my opening statement, never any objection. This was certainly treated as the law of the case. There is simply no valid reason for the mistrial. Because of that, the jeopardy, the jeopardy provisions would apply, and Mr. Butler will concede to you and has conceded to you that if Judge Buchanan was in error in granting the mistrial, then obviously the case must be dismissed.

We feel that this contention, Your Honor, this third contention that we make in regard to the mistrial is very urgent and very important. We feel that there is no necessity to have Mr. Washington taken back

through another trial, subject to another trial, when in fact the Court did make a mistake in relying on old Rule 314 and did make a mistake in granting a mistrial. We say that the matter is simply one that should now be terminated because of that, even if this Court does not go along with our contention that simply the matter of fairness must be looked at.

One question that I have asked the prosecutors, Your Honor, time and time again is, "How many shots do you get at a fellow? How many trials do you give him? You go through one trial and then you find out that you get caught in suppressing some evidence and you say, "Oh, well, you caught us this time. We'll let you have another trial,' " so we go through another trial and a prosecutor gets caught again doing something or a prosecutor suppressed additional testimony, and then we say, "Well, that's all right. That's twice. You get at least twice. You get at least two new trials." Then we do it again.

I don't know how many times courts will allow prosecutors to engage in misconduct, how many new trials will be granted. In our opinion, Your Honor, the

time has come to put a stop to this type of misconduct and to say to prosecutors in the future, "Don't do this type of intentional misconduct. Be a lawyer and make mistakes like all lawyers do, but don't do them intentionally. Don't withhold the evidence on purpose. Do it within your duty as you are obligated to do, and that's all right as long as you are doing your duty and as long as you are making just the normal usual customary amount of mistakes that prosecutors and other lawyers make. That's okay. We are going to forgive that type of action and we are going to grant a new trial, but where it's intentional, where it's on purpose, we say that once is enough."

And under the Ballinger case and those cases that follow in that line, we say that this type of conduct certainly is what the courts have had in mind, and certainly this misconduct should be borne in mind when this Court is making this particular decision.

We say all of these areas are important. We feel a little bit more favorable in the first and third arguments than in the second argument, although I still maintain the second argument in regard to speedy trial can be applied here. We are just

asking, Your Honor, that fairness be done to this man who has sat for five years, who has been punished for five years for no reason except that we had a prosecutor who had no knowledge of his duty or miscalculated his duty on purpose.

Do you have any questions, Your Honor?

THE COURT: No, I think you have covered it very thoroughly.

MR. BOLDING: Thank you sir. And too long.

(Recess taken)

MR. BUTLER: If it please the Court--

THE COURT: Well, perhaps, Mr. Butler, I could expedite this. I have had the benefit of this record for some time. I have examined it and studied it and renewed the examination as we got to today. The problem I have is the granting of the mistrial in the trial that was started, the retrial.

I think there is much to the argument Mr. Bolding has made on the other points, but I don't believe I would grant the -- I don't agree that he is entitled to the writ on what happened in the first trial or immediately after that trial, but I do have a very serious problem with the granting

of the mistrial, and I think I should tell you that and let you direct yourself to that.

MR. BUTLER: Fine, your Honor, I will confine my remarks to that issue.

It's the position of the respondent, Your Honor, that Judge Buchanan, when he granted the mistrial, properly exercised his discretion because he found that an impartial verdict couldn't be reached.

THE COURT: This is my problem. He didn't find that at all. Actually, it was argued for an afternoon and he denied it.

MR. BUTLER: That's correct.

THE COURT: Then you came in the next morning and said you had some additional study on the matter and some help and argued it again, and he ended up making the same statement. His statement is: "Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for the mistrial will be granted."

MR. BUTLER: Your Honor, I think in Judge Buchanan making that statement, it's implicit in his remarks that he believed at that time that those remarks of Mr. Bolding concerning the Supreme Court's de-

cision, those remarks would cause the jury or might cause the jury to reach an improper result.

THE COURT: Well, I don't see how you can say that. He doesn't give any indication. Let me tell you my own conception of the thing. In the first place, I can't agree, if I were going to make the finding, that it would be impossible with the two or three sentences that Mr. Bolding -- I agree, improperly -- made during his argument without objection, that it would be impossible to get the jury to disregard that. I have more confidence than that in juries. And it wasn't even canvassed here, "What could we do by way of undoing Mr. Bolding's unfortunate error? Could the Court very strongly point out, 'That these men have just been giving you a road map and none of what they say is evidence and you must absolutely disregard and lay out of your mind this comment about another case. It has nothing to do with this. Is there any juror who feels that he or she couldn't just eliminate that entirely from their minds and try this case fairly and impartially?' I think that could be done, but that would be me and not Judge

Buchanan.

But this isn't even canvassed in the argument, and Judge Buchanan evidently the night before decided that there wasn't any grounds for mistrial. He denied the motion.

I think, really, under the cases, that the Court is under the obligation, if he grants it, to find that manifest necessity exists for the granting of it.

Actually the one thing which bothers me and which I think had an effect on Judge Buchanan that led him to change his ruling was the fact that you stated to him very frankly, "Judge, I realize if I'm wrong in getting this mistrial, this man walks, and I'm so convinced of my standing I'm willing to take that chance." He at that point, as I recall, said something to you about, "Do you realize you didn't make an objection when this statement was made?" and you agreed that youdid realize that. And I think Judge Buchanan thought, "Well, I made a ruling yesterday and now the County Attorney tells me I'm wrong and he is willing to stake everything on my chang my mind," because the Judge doesn't anywhere say, that I can find, why he believes that there is manifest

necessity or that it's not going to be possible for the jury to be impartial or render an impartial verdict. He doesn't make any finding. This is my problem with it.

MR. BUTLER: Well, Your Honor, I think that when the Court indicates that if the Court were the trial judge, you would have handled it in a different manner, that may be, but I don't think that --

THE COURT: I don't think that has anything to do with it. I say that and this is just something in passing. I'm basing, really, my ruling on the fact that Judge Buchanan didn't state any finding on the basis of which he granted except Mr. Bolding had made these remarks.

MR. BUTLER: Well, Your Honor, it's my opinion that that statement made by Judge Buchanan in and of itself contains in it his reasons for the granting of the mistrial and his understanding that under the circumstances of the case, as it had existed or did exist at that time, that the jury would be unable to render a proper verdict. I do not believe that a trial Court has to say, "I find manifest necessity. I find that under the circumstances that

presently exist an improper verdict will be arrived at," before any appellate court could uphold the Judge's granting of a mistrial.

THE COURT: I think we disagree there. I think there has to be a basis for granting a mistrial. I think anytime that the Judge grants a mistrial over the objection of the defendant, double jeopardy just raises its head prominently, whenever you do that, and I think it's requisite that there be a finding of why you granted, that there is manifest necessity for it, in the language of the cases, or at least that the Judge say, "I find that it would be impossible if we went on with this trial no matter what we did about this impropriety of Mr. Bolding's, it would be impossible for the jury to arrive at a fair and impartial verdict."

MR. BUTLER: Your Honor, I think Judge Buchanan did make a finding. He did not use the words "I find manifest necessity." He did not use the words --

THE COURT: What you are actually saying is, even if his order is just bare bones, that you have got to imply these things. This is where I disagree.

MR. BUTLER: Your Honor, I think in the records it's obvious Mr. Bolding and I talked about manifest necessity. Mr. Bolding and I talked to the Judge about alternatives. Judge Buchanan considered alternatives. Mr. Bolding talked about an admonition. I talked about an admonition to the jury. I told the Court I did not believe any admonition could properly cure the statements that Mr. Bolding made. I think that it would be foolish for us to assume that simply becuase Judge Buchanan denied my motion for a mistrial the first day, that he did not think about that issue that night, because the next morning when I moved for a mistrial he was receptive to the arguments that I made.

It's difficult for me to understand how the Court believes if you don't use certain magic phrases, even though those magic phrases have been discussed in the arguments prior to the Court's arriving at its decision, that therefore the decision of the Court is an improper one. I'm not sure if the Court is telling me, Your Honor, that had Judge Buchanan said what he said and then said, "Because manifest necessity requires the material," or

"Because I find that an improper verdict would be arrived at, I have decided that these remarks --"

THE COURT: I think precisely that. In other words, I would know then he felt that and I would have to say that he found that, that he found that manifest necessity required it. Or if he said, "There is absolutely no way that I think we can undo this to the extent that an impartial verdict would be a possibility," This would settle it for me. But I can't find it.

MR. BUTLER: I certainly agree that it would make it clearer, but I don't think that by him not making those remarks that a proper finding could be made that Judge Buchanan did not consider alternatives, did not consider whether or not manifest necessity required that a mistrial be granted. Had Mr. Bolding and myself in our arguments not discussed those issues to the Judge, if there were no evidence in the record that suggested that Judge Buchanan considered whether or not the remarks would improperly influence the jury, if there were nothing in the record to suggest that Judge Buchanan did or did not consider alternatives, then I think that what the

Court is telling me would be a proper finding. Because if there is nowhere in the record to show that he thought about manifest necessity or nowhere in the record that shows he thought about alternatives and if he simply made that statement and said, "Mistrial," then I think it would be an improper ruling on his part.

But it is implicit in what Judge Buchanan said, based on the argument that he had heard from both sides. And that was a long argument and there was one recess when Mr. Bolding went to look for some research. We made some of the same statements we had made the day before. He knew, Judge Buchanan knew that I was saying that those remarks of Mr. Bolding had so influenced the jury that the jury could not render an impartial verdict. That was the reason why I asked for the mistrial.

Judge Buchanan knew that there were alternatives to his granting the mistrial, because we discussed them with him. After discussing those things with Judge Buchanan, he stated that because of Mr. Bolding's remarks he was going to have to grant a mistrial, and it is implicit in what he

said that he believed that those remarks of Mr. Bolding had so improperly influenced the jury that he had no other decision to make.

THE COURT: This is where you are reading something into it that I simply can't follow you. As I say, I really note a change in his attitude toward your motion from the point on where you say to him,"Look I know if I'm wrong this man walks, and I'm willing to have you rule with me on that basis," is the import of what you are saying, and he at one point, when you make that statement, says to you, "You realize that you didn't make any objection to these remarks when they were made." In other words, he is wanting to know, "Are you saying you will take this risk even though you made no objection?" and you tell him, yes, and go from there.

MR. BUTLER: He indicated I did not make an objection, but he never indicated that the objection made was untimely, and I would not concede for a moment that the objection that I made was untimely, because it was made at a time that allowed the Judge to remedy the error that Mr. Bolding had created. That's whether or not

an objection is timely or untimely, and I gave Judge Buchanan that option. He had, when I moved --

THE COURT: I'm not arguing that with you, but I am saying this shows the fact that he became more inclined to go along with you after you told him, "Look, I know the consequences if I am getting you to do something you shouldn't do."

MR. BUTLER: I think Judge Buchanan realized those consequences, Your Honor, before I said that. I mean he knows if a mistrial is improperly granted that a defendant walks. Surely I think it would be wrong to assume that my statement to Judge Buchanan was the first time Judge Buchanan had considered that.

Now I can't for a moment tell the Court what was in Judge Buchanan's mind. All we have is what's --

THE COURT: I think that's the difficulty both of us have when he didn't give any reason except just to grant the order on the basis of the statement.

MR. BUTLER: Well, when I say I can't tell what's in his mind, I'm referring to the effect that my statement made on him about I know he will walk if the mistrial

is improperly granted. I think there is every reason in that record that causes me to say, when Judge Buchanan granted that mistrial, the reason he granted that mistrial is because he had found in his mind that manifest necessity dictated the mistrial, because that's what we talked about. That's what we argued, and it was the basis-- our argument and the position we took caused Judge Buchanan to arrive at a decision. You cannot take Judge Buchanan's decision in a vacuum.

THE COURT: No, but you can't say, either, since he didn't say it, that he found there was manifest necessity for it. People usually, if they make a finding like that, express it. And I think we are all agreed that under the law, when there is a motion for mistrial on the part of the State for misconduct or some impropriety on the part of the defense counsel, the Court shouldn't grant it by reason of the double jeopardy situation that you get into unless there is manifest necessity for it. I think that's the language of all the cases. You used it in argument --

MR. BUTLER: Certainly --

THE COURT: --but then how can I or

anybody else say that Judge Buchanan found that, when it would take fifteen words or twenty words to say it and he didn't say it? He didn't say anything except, "Because Mr. Bolding said this, I'm granting the motion for mistrial." This is the sum and substance of the Court's action, and I think that you can't make a finding, in light of this, that Judge Buchanan found that it was manifestly necessary to grant the motion for mistrial. This is the problem I have with it.

MR. BUTLER: Your Honor, it's not going to do me any good, or the Court, to repeat what I have said. It's obvious your feelings and mine are different. I think that no case says that the Judge has to use the magic words "manifest necessity." I think what they have to find is that the record supports that manifest necessity was dictated, but I have not read a case that says a Judge, a trial judge, has to use those magic words.

THE COURT: You see what you get into then is that you don't get the ruling by the Judge who granted the mistrial; you get it from somebody who looks at the record and says, "Well, I think it would

have supported this, and I make the finding."

In other words, what I would have to do here, if I were going to sustain Judge Buchanan, is to say that I find that there is manifest necessity. And my reason for my statement earlier about I couldn't find it if it were me -- and yet I have to say, well, Judge Buchanan found it, although he didn't say so. I can't do it.

MR. BUTLER: As I say, I don't know what else I can tell the Court than what I have already said. I think it's obvious in the record that he found that, because that's what we were talking about in our argument to him.

THE COURT: Well, this is where we really part company, because I think findings are findings and not something that can be implied from the Order. I think to sustain that order you have to be able to show that the Court found it, not that he had to have found it, in order to grant the motion, because that's just mental telepathy.

MR. BUTLER: Your Honor, I really don't have anything else to argue on that point, and I don't want to repeat myself.

THE COURT: Well, I have been over this, as I say, the matter, and read all of the proceedings on the 8th of January and the 9th, and this is the conclusion I have come to with respect to the order granting the mistrial.

My finding is that the order was [redacted] I cannot find that the order was based on any finding of manifest necessity for granting the mistrial, and consequently a further trial of the defendant would be a violation of the double jeopardy provisions.

In the matter of granting the writ, I would make a provision incorporate in it that I would leave it to counsel to draw the order that the writ would be granted within sixty days unless the State has in that period given notice of appeal of my decision to the Ninth Circuit, and I would require that, if the appeal is taken, that the writ not be granted until the disposition of the appeal, not actually issued until the disposition of the appeal. There shouldn't be any difficulty in getting the narrow ruling that I have made to the Court of Appeals.

MR. BUTLER: Judge, can I ask a question? And it's a question I am going to ask out of ignorance in the federal system. Am I required to file a motion for rehearing before this Court?

THE COURT: No.

MR. BOLDING: And, Your Honor, in your ruling, you are granting the writ but you are making a finding against us on my first two contentions?

THE COURT: Yes. That was the import of my statement. I would not grant the writ on the basis of your contentions on the first two points.

MR. BOLDING: All right.

THE COURT: We'll stand at recess.

C E R T I F I C A T E

STATE OF ARIZONA)
) SS:
County of Pima)

I, David W. Lundy, do hereby certify that as court reporter in the United States District Court for the District of Arizona I was present at the foregoing-entitled proceedings; that while there I took down in shorthand all the proceedings had; that such shorthand has been reduced to writing under my direction, and that the foregoing typewritten matter contains a complete and accurate transcription of my shorthand notes as taken by me.

/s/ David W. Lundy
Court Reporter

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON,JR., Petitioner, vs. THE STATE OF ARIZONA, WILLIAM C. COX, SHERIFF, Pima County, Arizona, Respondent.	NO. CIV 75-85 TUC-JAW MOTION TO RE-OPEN EVIDENCE

COMES NOW the State of Arizona and William C. Cox, by and through the Pima County Attorney, DENNIS DeCONCINI, and his deputy, A. BATES BUTLER, III, and requests this Court to reopen this case for the purpose of taking evidence upon the question whether Judge Buchanan believed that manifest necessity existed when he granted the State's Motion for Mistrial in January, 1975. In support of this request, respondents submit the attached Memorandum of Points and Authorities and Affidavit.

Respectfully submitted this 3rd day of October, 1975.

DENNIS DeCONCINI
PIMA COUNTY ATTORNEY
/s/ A. Bates Butler, III
A. Bates Butler, III
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

Respondents base this request to reopen this case to take evidence upon the question whether Judge Buchanan believed that manifest necessity existed for granting the January, 1975, mistrial upon the following points: (1) the Court is vested with the authority to reopen a habeus corpus proceeding for the purpose of taking additional evidence, Martin v. Beto, 397 F.2d 741 (5th Cir. 1968), cert. denied, 394 U.S. 906, 89 S.Ct. 1008, 22 L.Ed. 2d 216; (2) the above issue was neither considered nor briefed by either of the parties; and (3) respondents are informed that Judge Buchanan is prepared to testify that manifest necessity did exist for the granting of the January, 1975, mistrial. (Please see attached Affidavit of A. Bates Butler, III.) This court is now respectfully urged to reopen this matter to allow Judge Buchanan to testify on the issue of whether manifest necessity existed.

Respectfully submitted this 3d day of October, 1975.

DENNIS DeCONCINI
PIMA COUNTY ATTORNEY

/s/ A. Bates Butler, III
A. Bates Butler, III
Deputy County Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR., Petitioner, vs. THE STATE OF ARIZONA, WILLIAM C. COX, SHERIFF, Pima County Arizona, Respondent.	NO CIV 75-85 TUC-JAW AFFIDAVIT OF A. BATES BUTLER, III

STATE OF ARIZONA)
) SS:
County of Pima)

I, A. BATES BUTLER, III, being first sworn according to law, state under oath the following:

1. That I am a Deputy County Attorney, Pima County, State of Arizona.

2. That I am the attorney for respondents in the above-entitled action.

3. That on October 2, 1975, after the Court in the above-entitled action stated its reasons for granting petitioner application for a Writ of Habeas Corpus, spoke with Judge Buchanan, the Arizona Superior Court judge who ordered the January, 1975, mistrial.

4. That Judge Buchanan stated to me that his ruling in January, 1975, meant that

there was manifest necessity for granting the State's Motion for Mistrial because of defense counsel's improper remarks in his opening statement.

FURTHER, AFFIANT SAYETH NOT.

/s/ A. Bates Butler,III
A. Bates Butler, III

SUBSCRIBED AND SWORN to before me this 3rd day of October, 1975, by A. Bates Butler, III.

/s/ Laura Coleman
Notary Public

My commission expires:
Oct. 11, 1975

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR., Petitioner, vs. THE STATE OF ARIZONA, WILLIAM C. COX, SHERIFF, Pima County, Arizona, Respondent.	NO. CIV 75-85 TUC. (JAW)

Respondent having moved herein to reopen this cause for the purpose of taking further evidence, and petitioner having filed opposition to the motion, and the court having fully considered the same,

IT IS ORDERED that respondent's motion to reopen evidence is denied.

DATED: October 9, 1975.

/s/ James A. Walsh
United States District Judge

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

RELEVANT EXCERPTS
from the
PARTIAL SUPERIOR COURT TRANSCRIPT of
Washington's Second JURY TRIAL

Dated January 8, 1975

[Partial Transcript also includes All Arguments and Testimony on January 9, 1975 and January 10, 1975.]

I. Mr. Butler's Voir Dire

[Page 2]

(Following the selection of 34 prospective jurors and following voir dire by the Court, the following proceedings were had.):

THE COURT: Ladies and gentlemen, I will tell you at this time that in this case the defendant is charged with the crime of murder. However, this is not a death penalty case. The death penalty does not apply in this particular case.

[Page 6-7]

"MR. BUTLER: *** I think the Judge mentioned to you that what we're concerned with here is an event that occurred on the 13th of December, 1970, a little more than four years ago. It occurred at the Arizona Hotel over here on North Sixth. It's 35 North Sixth. Have any of you ever stayed at the Arizona Hotel or had any friends or relatives that have resided at that hotel? Yes, sir?

***O.K. Anybody else? Does the fact that the alleged crime occurred almost, or excuse me, more than four years ago, does that fact and that fact alone cause you to, for one reason or another, be unable to sit as a juror in this case?

GRGICH [Juror]: The only thing it would do it would raise in my mind the credibility of some of the witnesses.

MR. BUTLER: O.K. That's a problem with the passage of time.

Now, the Judge has indicated, at least I think he indicated that the defendant has a presumption of innocence***"

[Page 14-18]

"MR. PLACENCIO [Juror]: Is Mr. Alonzo Rodriquez also charged with murder?

MR. BUTLER: Yes.

MR. PLACENCIO: Even if he testifies, he would still be charged with murder?

MR. BUTLER: He's charged with murder, correct.

Now, as one of the individuals indicated, because it's four years since this crime occurred, they may have a problem in considering testimony because memories fade. You may also see in this case the witnesses, or many of the witnesses that have testified, or will testify before you, have testified in at least two prior proceedings because we have transcripts of what they said four years ago. We know what they said then but as I say, memories fade, what people said four years ago may not exactly coincide with what they say today. Like all of us I don't think can remember everything we said and saw and heard yesterday. We're asking some people to come in here to tell you about things they saw and heard and said four years ago, so there may be some witnesses who make what lawyers call prior inconsistent statements. They said something four years

ago and it may not exactly be the same today.

Because it may not be exactly the same on the witness stand as they made in a prior statement, whenever they made the prior statement, are there any of you that would automatically say, 'That person must be a liar'?

MR. BOLDING: Your Honor, I have to object to this line of questioning. I don't know whether Mr. Butler knows what the testimony is going to be from the witness stand. It appears that he's trying to get the jurors that if a witness lies up there that they'll say it's all right.

THE COURT: Is that the end of your question, Mr. Butler?

MR. BUTLER: That's the end of my question but that's certainly not what I'm asking the jury.

MR. BOLDING: I would ask that be cleared up, your Honor, that's certainly the impression I got out of it.

MR. BUTLER: O.K. Ladies and gentlemen, for Mr. Bolding's benefit and for anyone else's benefit who I caused to have a misunderstanding of what I said, if an

individual gets on the stand and lies, I think you have to disregard what he says. What I mean to tell you is that memories fade. I don't have any more idea than Mr. Bolding has as to exactly what each person is going to say, each word they're going to say. We've all talked to them before but we don't know what everyone is going to say from that witness stand. All I'm asking you is if you will consider the fact that four years have passed. If you find that somebody made a prior inconsistent statement, are there those of you that feel that because they may have made a prior inconsistent statement, that that fact alone means they're lying? Now, you're to consider their demeanor on the witness stand and---

MR. GRGICH: Are you talking about a minor point or a major point?

MR. BUTLER: All right, if it's a minor [sic] point, I think you ought to consider it harshly. If it's a minor point, I'm saying I think minor points the memories fade. If somebody gets up there and turns a ninety degree angle---

MR. GRGICH: Are you just talking about a minor portion of the testimony or a major portion? Obviously, if it's a

a major portion--

MR. BUTLER: Then I think you ought to look at that witness awfully carefully.

MR. GRGICH: That's what I mean, I don't understand what you mean.

MR. BUTLER: I'm talking about is a minor inconsistent statement. I'm not talking about somebody that said the sky was blue on December the 13th and gets up there and tells us today or this week that the sky is red on that date. I'm not talking about somebody that makes a completely opposite turn. If that happens I'll be talking to you about lying. I'm not talking about that at all. I'm talking about somebody that makes a minor inconsistent statement.

Now, you will hear from at least one individual that was in the Arizona Hotel the night of the killing***"

"Now, you will hear from at least one individual that was in the Arizona Hotel the night of the killing, a patron. You may hear, through one means or another, from others, but I suspect that the testimony will reveal that the witnesses, the actual eye witnesses to the robbery are unable to get up in court and point with proof positive that George Washington, Jr., was the robber. The State has other evidence to indicate that. What I'm asking you is this: During an armed robbery or an armed robbery attempt, the use of the term armed robbery obviously indicates that the individual carries a weapon. I think the State will show that the weapon here was a shotgun.

Are there any of you that do not realize that one of the purposes in carrying a weapon during an armed robbery, so that witnesses will be watching that weapon, and not the face of the robber.

MR. BOLDING: Your Honor, this is clearly improper. There will be no testimony like that. This is just outside the record and I'll have a motion to make when we go in chambers. It's just very disturbing that he would use that kind of type of testi-

fying in voir dire.

THE COURT: Withdraw that question, Mr. Butler?

MR. BUTLER: I think the question, your Honor, was proper and I think the evidence will indicate what I said is what will happen. I think Mr. Bolding's statement that I was out of the record, or outside the record and they won't hear any of that is wrong.

MR. BOLDING: I object to it, it's improper.

THE COURT: I'll sustain that objection. I didn't quite understand that question.

MR. BUTLER: All right. Ladies and gentlemen, let me ask you this, if the eye witnesses to the robbery tell you that they can't say proof positive that George Washington pulled the robbery but if the State introduces other evidence that indicates to you, other witnesses that indicate to you that George Washington committed that robbery which a man was killed, why he's charged with murder, if we prove it through other witnesses, prove it beyond a reasonable doubt, are there any of you that couldn't find him guilty?

MR. PLACENCIO: I don't understand

your question.

MR. BUTLER: O.K., I don't expect people to get up and say, "I saw that man rob, or try to rob the hotel during which a man was killed." The State will introduce other evidence that indicates, I believe, indicates this gentleman killed an individual in the Arizona Hotel during a robbery, but we will not introduce eye witness testimony that he did it.

MR. ELLIOTT: Is the other evidence, is it circumstantial evidence or would it be--

MR. BUTLER: Well, the Judge will instruct you at the end of the case, I anticipate, that you are to consider circumstantial evidence just like direct evidence. And I think we're going to have both circumstantial evidence and direct evidence. All I'm asking you is this: If we don't have an individual that says, That's the guy that did it because I saw him do it" but if we prove to you beyond a reasonable doubt through other evidence, through other witnesses, through statements, anything like that, that this individual George Washington pulled the robbery, are there any of you that would still say,

"Well, I'm sorry but I'm not going to find him guilty"?

II. Mr. Bolding's Motions for Mistrial Following Mr. Butler's Voir Dire

[Page 24-25]

THE COURT: Mr. Bolding, you had a couple matters I think you wanted to make a record on at this time?

MR. BOLDING: ***Yes, Your Honor, I do object to the fact that the Court did advise the prospective jurors in voir dire that this is not a death penalty case.*** They think the penalty is something but they don't know what it is and that's, I believe that taints the jury, prejudices the jury and I move for a mistrial on that basis.

Secondly I want to make a motion for a mistrial because of the fact that Mr. Butler stated that there were proceedings in this case four years ago and that there would be transcripts from four years ago and witnesses who testified four years ago. The only reading, of course, from that is that there was a former trial in this matter, and, of course, with a former trial and the fact that George is in custody and in the accompaniment of the Sheriff at this time and in the Pima

County Jail, that leaves the jury no alternative but to know there was another trial four years ago in 1970. Their only deduction could be that there was a finding of guilty at that time and that something happened in the intervening time and we have another trial.

Bate's words were that there were proceedings four years ago and we would request the Court to have those words read back by the court reporter in order to make a determination in that area and we make a motion for a mistrial based on that also.

Our third matter ***"

III. Mr. Butler's Response to Mr. Bolding's Motion for Mistrial Based on His Mention of "prior proceedings", and Judge Buchanan's Ruling.

[Pages 27-29]

THE COURT: Zeke [court reporter], would you read back there where Mr. Butler made mention --

(Portion of record read by the reporter.)

MR. BUTLER: ***As [sic] far as the second motion for a mistrial, it kind of surprises me that Mr. Bolding--well, I guess it shouldn't surprise me, he made the motion, but I think it's kind of novel in that Mr. Bolding has already indicated, I believe to the Court, and I know he's indicated to me that he's going to attempt to use a transcription of one Luke Murray from the last trial. I assume that when he does that he is not going to use the word trial, probably will use the word prior proceeding.

We also have a preliminary hearing here, we have preliminary hearing transcriptions. In the testimony of Mr. Murray at the last trial, extensive use was made of the preliminary hearing transcript,

used by Mr. Cooper in his cross-examination of Mr. Murray, so in the testimony of Mr. Murray alone, it's going to come out (1) he's testified, we've got him down, his testimony, and (2) in that testimony or in that transcription, they talk about the preliminary hearing, which is the second prior proceeding I talked about.

We have--the Washingtons are going to testify, three of them. We have Marquex is going to testify, Bruck will testify, Bunting will testify, Pershing will testify. All those individuals testified before and I think that it's ludicrous to assume that these individuals memorized what they said four years ago. I think it's ludicrous to assume that they're going to say exactly the same thing they said four years ago, and I think it is highly likely that either Mr. Bolding or myself will use these transcripts to refresh their memory or to impeach them, also Mr. Grant.

***In my talking to the people, they're saying that they are not as clear on it today as they were four years ago. Therefore, it's going to be imperative to ask them, to refresh their memory with the prior transcripts, or with the

transcripts. The only thing you can call them, I think, without avoiding error, is a prior proceeding, and I don't think there's anything at all improper in what I said.

Now, as far as the priors***"

[Page 33-34]

"THE COURT: Motion for mistrial regarding advice that this is not a death penalty case is denied.

The motion for mistrial regarding the reference to the four-year-old transcripts is denied."

* * *

THE COURT: Mr. Butler, you want to make, for the record the proceedings had in chambers, or your motion to preclude the defense from mentioning the penalty involved?"

MR. BUTLER: Yes, your Honor. At this time I would request that Mr. Bolding and myself be precluded from mentioning punishment to the jury because it's the position of the State the jury is not entitled, under the present status of the law, to consider any possible punishment and it would be impermissible for Mr. Bolding or myself to get into that. It's my understanding that, off-the-record in chambers, Mr. Bolding was instructed by the Court not to discuss it and Mr. Bolding indicated that he would discuss it anyway and then Mr. Bolding indicated he would try to handle it so that he was not held in contempt.

I would simply at this time, your Honor, request that your instructions to Mr. Bolding be put into the record as far as his being allowed to or not allowed to comment on possible punishment.

THE COURT: Mr. Bolding, you made a previous record on the grounds for that, I think, but you can go ahead if you want to make any additional record on that.

I am entitled, therefore, to tell the jury that this is a case in which, if Mr. Washington is found guilty,that he will be sentenced to a life term in prison, at the discretion of the jury and, therefore, I feel that the motion should be denied as I've argued in chambers and that because this is a case which involves a person, a case that involves some rights to this person, a case that should be tried fairly not only from the State's standpoint but the defendant's standpoint as well. And because primarily the prosecution has evidenced over this course of four years that they are not fair and that they are not going to be fair. I think that the Court should bend over backwards to make sure that the prosecutor is fair to this person and deny this motion and allow me to argue what the law is and what the law is going to be, and that is that if this man is convicted, that he's going to get a life term in prison, a natural life term. And if I'm precluded from arguing in that nature and precluded from voir diring the jury in that manner, this man has been seriously deprived of his rights under the law and although the

County Attorney has evidenced the fact that they do not care about this, I do care and for that reason, we say that the Court should grant the motion--or should deny the motion presented by the County Attorney and should allow me to voir dire the jury in that respect.

THE COURT: Thank you. State's motion as previously indicated is granted. Defense counsel are directed not to go into the matter of the sentencing in this case in the event of a conviction.

Please call the jury.

MR. BOLDING: I'm moving at this time for a mistrial, your Honor, based on the Court's ruling. I cannot get a fair trial, the jury is being prejudiced by the Court's statements and I move for a mistrial and ask, since no evidence has been presented at this time, since all that we've done is call the list of jurors, since the Court and the prosecutor are the only ones who have now voir dired the jury, I move for a mistrial, ask that a new jury be called and that the matter be reconsidered by this Court.

THE COURT: Motion is denied.

IV. Mr. Bolding's Voir Dire

[Page 44]

"(Following proceedings were resumed in open court, another roll call of the jurors and voir dire examination of prospective jurors by Mr. Bolding, whereupon a recess was taken and several jurors called in and questioned individually by the Court and counsel and another recess was taken for the purpose of allowing the attorneys to strike prospective jurors.)"

[Voir Dire examination of the prospective jurors by Mr. Bolding is included in a separate transcript of sixty-two pages, also dated January 8, 1975, which transcript was lodged with this Court on or about May 26, 1977, and is referred to in Petitioner's Brief as Exhibit 1.]

V. Excerpts from Mr. Butler's Opening Statement to the Jury

[Page 50-51]

"***Now, you heard the Clerk read the information. George Washington is charged with the crime of murder in the first degree. The State has alleged through the vehicle of the information that that event occurred on or about December 13, 1970, and I say George Washington, Jr. I know what his name is. I guess Mr. Bolding has forgotten mine. My name is Bates Butler. It's a trick, he called me prosecutor, I call him defense attorney. We all have names and we all know it.

The information which was read to you brings the case to you for your consideration. The posture is, and you will hear that witnesses have testified before.

Mr. Bolding has indicated they testified at a trial. You will also hear evidence that witnesses testified at a preliminary hearing. A preliminary hearing is in front of a magistrate. As the State presents its evidence and a result of that hearing, the Judge considers the evidence, makes a decision and the result

of his decision, the information is filed. This is as opposed--

MR. BOLDING: Your Honor, I object, of course, that's going to be outside the record and I'd like an opportunity to make a motion at a recess.

THE COURT: The record will reflect your objection.

MR. BUTLER: You will hear witnesses that have testified in a trial and have testified in a preliminary hearing, that's what a PH, preliminary hearing is. Now, the law we're talking***"

[Pages 54-55]

"Mr. Bolding has mentioned that Mr. Washington has been in prison. So has Mr. Sanford. They met there, or at least they knew each other there***"

VI. Excerpts from Mr. Bolding's Opening Statement to the Jury

[Page 61-62]

"***I tried to make a few notes of what Mr. Butler said he would prove. You're entitled, incidentally, once the evidence begins, you're entitled to make notes, entitled to get a note pad from Andy, my friend Andy over here, our friend Andy over here, a note pad and take some notes of some of these things that might be of interest to you.

MR. BUTLER: Judge can we approach the bench.

THE COURT: I think that's a matter that hasn't been determined by the Court yet in this case. I'll take that up.

MR. BOLDING: I may be overruled on that, I'm sorry. I'm sorry, your Honor, I'll approach that later.

O.K., what's going to be proved? The prosecutor told you some things that he thought were going to be proved and it was very interesting to see that he left out a lot of things that even his witnesses are going to prove to you. And isn't it strange that all of the things that he left out are what we call exculpatory matters,

exculpatory, not--exculpatory matters will be matters that would show that George didn't have anything to do with the shooting at the Arizona Hotel. I don't know why he didn't mention a lot of these things unless it's just kind of that he doesn't want to bring out to you those things that will be mentioned that will show that George didn't do this shooting even though, as he promised yesterday, he will not require that George show you any evidence that he didn't do it.

Here's what will be proved, and that is that there was a shooting at the Arizona Hotel on December 13th, 1970 at about 9 o'clock.***"

[Page 65-66]

"MR. BOLDING: ***the shooting I think you will find out happened on December the 13th***Two hours later, two hours and five minutes later Mr. Choat signed a statement, looked at it, read it, thought about and said, "There is no doubt in my mind but what I could identify the man who did the shooting."

Why wouldn't Mr. Butler want you to hear that? 'There is no doubt in my mind but what I could identify the man

who did the shooting.' Well, I think one of the reasons that Mr. Butler--

MR. BUTLER: Your Honor, I'm going to object to this form of argument.

MR. BOLDING: It is argument and I apologize. I withdraw that, sorry, my fault.

We think the evidence will show***"

[Pages 68-69]

"I think you'll hear Sergeant Bunting's words to this effect, that Mr. Choat stated that he thought all of the participants in the lineup sounded like Mexican males except for No. 1 and No. 6. This was after Mr. Choat had identified No. 1 as being the man who said the words that night. Sergeant Bunting, we think you'll hear--we know we'll hear evidence, that at the last trial he stated that he didn't say this but at this trial he'll have to admit that he said this, that he told maybe a little white lie on the witness stand the last time around, said that No. 6 was occupied by George Washington, Jr., whereupon Mr. Choat said, "Well, No. 6 would be my alternate selection." O.K., you'll hear that testimony. You'll hear that from Mr.Choat, that the man that did the shooting the night of the Arizona Hotel, did not have a mustache. Look over here. You'll hear testimony that George Washington, Jr., except for losing a little hair up here on top, George looks exactly like he did on the night of December 13th, 1970, exactly. That's the testimony you'll hear from Sergeant--from Larry Bunting, no less, and from Delbert Choat

no less, "Yeah, we looked at George that night and he looked just like this." Delbert said that night that the man that did the shooting did not have a mustache.

O.K. Another eye witness you'll hear from and some of this testimony, incidentally, as we mentioned before will come from books like this, transcript of that last trial. For reasons you'll hear--you'll hear testimony that Luke Murray, Luke Murray is dead. Luke Murray was a eye witness and luckily, we had his testimony from the last trial and you'll hear testimony from him, from Luke Murray that says that as he looked at this man, "George, as I look at you, he says, "This is not the man."

[Page 71]

"You'll hear from George Archeletta as prosecutor Butler told you. You'll hear that he picks out a car that was in the back of the Arizona Hotel and about the time that this incident took place, 9 o'clock on the night. ***He's going to tell you that he saw a man come down--

oh, park the car, go up into the hotel and come back down, that he saw no face. He can't identify any person, didn't see a face. Now, how in the--restate that, how in the world he's going to tell you that the man he saw was black when the night was black --

MR. BUTLER: Your Honor, I'm going to object to argument.

MR. BOLDING: O.K. I'll restate that. If you hear that type of testimony***"

[Pages 73-74]

"And we are going to attempt to bring you testimony from a Mr. Frank Bibble, who will tell you that the car that he saw--

MR. BUTLER: Your Honor, I'm going to object to this. Can we approach the bench at this time, Your Honor? I'm sorry, I have to approach the bench.

(off-the-record discussion at bench between Court and counsel.)

MR. BOLDING: We think that you will hear testimony and we are going to attempt to bring you testimony from a Mr. Frank Bibble who said***. That testimony was not available at the last trial, we think

you will hear.

You will hear testimony from a man named, its attributable to a man named James Holt who was an eyewitness to this killing which was not available at the last trial, and that testimony will***"

[Page 78]

The same detective who arrested George on the night of December 13th, 1970, you'll hear, who came to the Esquire Bar where George was sitting having a drink after having spent the entire day, you will hear, with a person named Werle Wilson's house, a friend of George, she and her children. You'll hear Werlene's testimony, not from the last trial but new testimony, that George although this testimony was available at the last trial, but George didn't testify at the last trial and he will testify at this trial, so you will hear testimony that he spent the day at Werelene's house***"

[Pages 80-81]

"Well, that not being enough, we think you'll hear Detective Bunting said to George, "Hey, George let's go down to the

station, go down to the station house here. Would you go down there, we think you did a shooting over here at the Arizona Hotel, and we have a witness down there, George, at the Arizona Hotel that's waiting to identify somebody and we think he can identify somebody and will you go with us down to the police station to be identified by this person at the Arizona Hotel?" and George says, "Sure" knowing that, you know, it's an absolute impossibility for anybody to identify him as being there because he wasn't there, so George goes with him and since George goes with him voluntarily, Detective Bunting is of the opinion that he didn't arrest George that night although what do you suspect might happen if George had said, "No, I don't want to go down there with you?" but at any rate --

MR. BUTLER: I'm going to ask that be stricken as improper argument.

THE COURT: Motion is granted, the jury is admonished to disregard that.

MR. BOLDING: At any rate -- I'm sorry, Your Honor -- at any rate the testimony you will hear that George voluntarily let the police look in his car***"

[Page 82]

"We think you'll hear that this is not what you would call a normal and usual family relationship in that we think you'll hear that George Washington, Senior, looked at this man to whom he had given his name, George Washington, Jr., when he was seven years old, and kicked him out of the house. And we think you'll hear from the testimony that George had done some things that he's not proud of and he served some time in prison--he didn't want me to tell you that. That he served some time in prison and that at no time, anytime, anywhere within the past eight or ten years before this incident supposedly happened***"

[Pages 89-92]

"Who else are you going to hear from? Another very interesting person name of Al Rodriguez, who is guilty, testimony that you will hear is that he is guilty of first degree murder in the shotgun shooting of a clerk at the Arizona Hotel on the night of December 13, 1970. He's guilty of that murder.

You'll hear that on the night of December 13th, that Al Rodriguez told at least five people, and maybe six people, and signed a statement just like Mr. Choat did--big file on him--signed a statement saying that the man that did the shooting on the night of December 13, 1970, was a man who spoke with no negro accent, was a person who said "Quemato." What does that mean? You'll hear testimony, I think, that that word means, what, look out, I will kill you or something like that, that the man that did the shooting was light complexion. You will hear testimony that says that Rodriguez said the night of this killing that he was positive it was a Mexican male, that Rodriguez was positive it was a Mexican male, that Rodriguez was positive that the man spoke with a Spanish accent and is positive the suspect is Spanish, six or seven times. New evidence.

You will hear testimony that he signed the statement to this effect, that he left. You will hear testimony that notwithstanding the fact that we had a trial in May of 1971 in this matter, that the prosecutor hid those statements and didn't give those to the lawyer for George

saying the man was Spanish speaking, didn't give those statements at all, hid them. Not this prosecutor. Prosecutor who has been taken off this case.

You'll hear testimony that Mr. Rodriguez was next seen in Salina, Kansas, in October of 1974. Coincidentally and ironically, you will hear just after a new trial had been set for George Washington, Jr., suddenly he's found in Salina, Kansas, you will hear. You will hear that Larry Bunting went to Salina, Kansas, and talked to Mr. Rodriguez and that for seven, eight, ten, fifteen minutes Mr. Rodriguez said, "No, I didn't have anything to do with it. No, it was a Spanish speaking guy. No, it was a guy that said Quemato. No, it was, you know, the night of the shooting you talked to me and everything I said is true the night of the shooting and you showed me a lot of pictures and you showed me pictures of everybody and no, you didn't show me any pictures of the killer."

Whereupon you'll hear testimony that Larry Bunting whips out a picture of George, ironically, and says--and we think you will hear the testimony is--,

that Sergeant Larry Bunting whips out a picture of George Washington, Jr., and says, "Listen, we have your partner in this case. This has been convicted of the shooting and is not getting a new trial and we have enough evidence on you, Rodriguez, to where we could turn this man loose." Whereupon what does Rodriguez say: "Oh, well, O.K., that's the guy but he didn't have a mustache." Poor Larry's heart did flip flop I'm sure at that time.

MR. BUTLER: Objection, improper argument, your Honor.

MR. BOLDING: I think the testimony will show that Larry Bunting was quite shocked at that and so we think the testimony will show, then, that Mr. Rodriguez was brought back here and will be here to testify for you.

Could we approach the bench for just a minute.

(Off-the-record discussion at bench between Court and counsel.)"

[Pages 92-93]

MR. BOLDING: We think the evidence will show that Mr. Rodriguez admits to his part in the shooting and says that the man that did the shooting, of course, he

doesn't recognize anybody that did the shooting, he will say. He will say that he drank with a man all day and planned a robbery of the Arizona Hotel and that he was drunk and that he was confused and that he drank with four men all day and at first he will tell you that he can't recognize anybody else except this man right here, George Washington, and then he will tell you, "Well, that's a lie because I did recognize another one of the men that I was drinking with, a Chicano who I saw four days later and told him 'Hey' "you know, or whatever, saw him four days later, so, but he can't remember anything except conveniently.

MR. BUTLER: Objection, your Honor, to the word conveniently. I apologize to the Court --

THE COURT: Sustained.

MR. BUTLER: --but I'm tired of doing this.

MR. BOLDING: Except that he remembers only George, or the picture of George, and George, he will say he remembers George I think, except that George did not have a mustache on the night of the shooting.

Please keep in mind that you will

hear testimony from many people that George has always had a mustache."

[Pages 93-96]

"You will hear evidence that will show you that there was another eye witness in this case. You will hear evidence that will show another person named James Hanrahan was an eyewitness to this case, to this shooting. You will hear that James Hanrahan describes the man who did the shooting as being a large negro male with an afro, with no mustache, and you will hear that James Hanrahan said [sic] this man is not the man. That evidence you will hear was not utilized at the last trial. You will hear that that evidence was suppressed and hidden by the prosecutor in that case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case. That's what you will hear.

You will hear that through this testimony, that the wrong man was convicted.

You will hear through this testimony from George that he spent four years, two days and eight hours incarcerated for something that he did not do.

We would ask that each of you keep an open mind as you're listening to the testimony as it comes from the prosecutor. We would ask that you keep an open mind because George, through his lawyers, me and John, do not -- we do not have a way to get to you our testimony yet. The prosecutor puts on his testimony first and will put on essentially what he's told you but listen to what I've told you. You told us yesterday that you would be fair and unbiased. You told us you would be open minded. Listen to all of the evidence as I've told you it will come out. If it If it doesn't come out like that, hold it against me, hold it against me.

That is the evidence. That is what the evidence really is. We ask that you keep an open mind We ask that after all of your consideration of the testimony that you think about this man and we ask that after you hear the testimony, that you remember your duty. We feel that the evidence will show nothing except that

George Washington, Jr., is not guilty.

THE COURT: Thank you, Mr. Bolding.

MR. BOLDING: Thank you, Your Honor.

THE COURT: Ladies and gentlemen, we will take the noon recess at this time until 1:30 this afternoon. Please remember the admonitions that I gave you last evening about not discussing the case.

Apparently, I misspoke last night that you were not to attempt to view or visit the scene of the homicide in this case, which you should not do, so until 1:30, stand at recess."

VII. Mr. Butler's Motion for Mistrial and Argument Therefore Following Mr. Bolding's Opening Statement to the Jury on January 9, 1975.

[Pages 96-97]

(NOON RECESS)

(Following proceedings held out of the presence of the jury):

THE COURT: Mr. Butler, you indicated that you have a motion to make outside the presence of the jury?

MR. BUTLER: Yes, Your Honor, I have. I'm going at this time, Your Honor, to move for a mistrial based on the misconduct of Mr. Bolding in his opening argument on several grounds. He was repeatedly told by the Court to avoid arguing, He did not stop arguing, he continued to conduct an improper opening argument and I would object and, my objection would be sustained but it didn't slow Mr. Bolding down one bit. It's improper. That's my first ground for a mistrial.

My second one is, Your Honor, Mr. Bolding in his argument kept talking about evidence that was hidden from the defendant at the last trial. He talked about, I think his words were something like, "George

Washington could not possibly be the man" and went on to say there was another eyewitness in that case, James Hanrahan, who describes the robber and killer as a large negro male, with an afro, no mustache. Then he said Mr. Hanrahan, he said in looking at George Washington, Jr., "This man was not the man."

Mr. Bolding then said that evidence was suppressed, hidden, purposely withheld by the prosecutor at the last trial and then he said gratuitously that it was not me, I was not the prosecutor. And then he went on to say, your Honor, that is the reason for the new trial. He then said, if my notes are correct, your Honor, that the Supreme Court of the State of Arizona granted a new trial because of the prosecutorial misconduct in the last trial. Mr. Washington then spent four years, two days and eight hours because of that misconduct.

And then Mr. Bolding said, Your Honor,"If I haven't said anything -- if I don't prove any of the things that I've said, hold it against me, not George because that is the evidence. That's what the evidence really is. In other words,

the Judge may not let that in but that's what the evidence is, ladies and gentlemen."

He made that statement, your Honor, knowing he could not prove it. Your Honor, he put on evidence of what Frank Bibble said, what James Holt said. Those witnesses are unavailable to testify, anything that they said to anyone is hearsay. He can't get that in. He knew he couldn't get it in when he made the statements but he says it anyway. In other words, Mr. Bolding is going to prove his case in his opening argument whether he gets the evidence in or not because the jury heard it and that's all he's after.

Because of those reasons, your Honor, I am asking for this mistrial. I don't want to. I've got my witnesses here and they don't know about the motion for the mistrial except for one of them and he was appalled, but I told him I didn't have any choice because of Mr. Bolding's misconduct.

The other problem is this, Your Honor, if the motion for mistrial is not granted, I am going to be forced to go into the matters that Mr. Bolding says

he's going to show about how the reasons for the new trial. If I am forced to that, I will have to call the individuals who I just subpoenaed over the lunch hour, and these individuals are: Judge Robert Roylston, Judge Richard Roylston, Deputy Sheriff Melvin Hill, Eugene Davis, Randy Stevens, Rick Cooper, Dan Stokall, and I would attempt, your Honor, through their testimony to prove that Mr. Bolding was guilty of subornation of perjury, and I don't like making that statement but I'm forced to, your Honor, because that's the way this trial is going.

Mr. Bolding does not want to try George Washington, he wants to try what happened four years ago in the handling of this case by the County Attorney's office. That issue has been decided by the courts. That issue should not be tried at this time but Mr. Bolding has done everything he can to throw it in and he can't prove it, your Honor, because it's all incompetent evidence. It's got nothing to do with this case. Thank you.

VIII. Mr. Bolding's Response to Mr. Butler's Motion for Mistrial on January 9, 1975.

[Pages 99-102]

THE COURT: Mr. Bolding?

MR. BOLDING: Your Honor, I didn't realize I was touching such a nerve. My argument, my opening statement this morning was direct at what I will -- what I believe the evidence will show. I said nothing this morning that I don't believe the evidence will show, in other words, everything that I've stated I believe at the end of this trial, I would have shown or I wouldn't have argued that. I wouldn't have made that in my opening statement.

I will be showing that evidence was hidden. I will be showing that the prosecutor had some of this evidence and didn't divulge it to Mr. Washington or his lawyer at that time. This argument -- that's what the evidence is. What I think, in context what the argument was, if that's what the evidence is, that's what the evidence is that you will hear, that's the type of evidence that will be presented to you by me.

I don't know what Mr. Butler's talking about, unavailable to testify. I know of -- I guess that's something else that they've withheld from me because I don't know that some of these witnesses are unavailable to testify. I am looking for some witnesses actively. I'm still looking. As the Court remembers, I made a motion to continue based on the absence of Holt and Bibble. I am still actively looking for those people and I anticipate by the time my case, my time comes around to put them on, I hope to be able to present them at that time. If not, this jury can consider that fact that they haven't testified. I hope to be able to have them here and I honestly do hope to have them here.

Mr. Butler, I don't care about subpoenaing Robert and Richard Roylston, Mel Hill and Bud Davis and Stevens and Cooper and Sokoll. That's great because if he hadn't subpoenaed them, I would anyway. I just didn't do it in advance because I didn't want to tip my hand to the prosecutor and that's exactly the type evidence that is going to be presented in this case. You know, if he wants to prove that I've committed the crime of subornation of per-

jury, subornating perjury, rather, I guess he's free to do that if he wants to issue a complaint, if he wants to take me to the grand jury, I guess he can do that. You know, it didn't happen, everybody knows it didn't happen but if he wants to attempt to do that, that's fine too.

I said nothing this morning, Your Honor that I did not honestly intend or think that I could prove in the way of evidence, and as I understand it, that's what an opening statement is for, so that you can tell the jury what will be the evidence.

I do apologize, there was some argument and I did go on a couple of occasions at the time Bates called me on it, that's true, and I apologize for that. I intend in any opening statement that I made to show what evidence I will present and I have tried to show this jury what evidence I will present and I believe my prediction is by the time this case is over, that is the evidence that's going to be presented specifically and exactly, the words that I quoted, and so I see no basis for a mistrial at this time, your Honor.

IX. Colloquy Between Judge Buchanan, Mr. Butler, and Mr. Bolding Regarding Mr. Butler's Motion for Mistrial on January 9, 1975.

THE COURT: What were your specifics, Mr. Butler, as you enumerated them on the misconduct of the County Attorney's Office, what the Supreme Court did in this case.

MR. BUTLER: Also as to what Mr. Hanrahan would testify to or would say as far as he was an eyewitness and he gave a description which Mr. Bolding went through, of the robber.

THE COURT: Why don't you start from the top, then, other than the improper argument.

MR. BUTLER: O.K., Your Honor, I think the first thing I indicated was Mr. Bolding, the way my notes reflect, went like this. He said, George Washington could not possibly be the man." He said there was another eyewitness in this case, James Hanrahan, mentioned his name. He said James, or "Mr. Hanrahan describes the robber as a large negro male with an afro, no mustache." And when Mr. Bolding said that James Hanrahan said in looking at this

man, Mr. Washington, "This man was not the man, was not the robber." Mr. Bolding then said that evidence was suppressed, hidden, purposely withheld by the prosecutor and then he said--

MR. BOLDING: I'm sorry, Your Honor, could we take these one at a time.

THE COURT: That's what I'm trying to do.

MR. BUTLER: I'm sorry, did I go too far?

THE COURT: No, I thought this was-- are you objecting?

MR. BOLDING: All one?

THE COURT: I thought it was.

MR. BUTLER: It is all one, your Honor.

THE COURT: You're saying that he's not going to be able to prove what Hanrahan said and what Hanrahan saw and how Hanrahan identified Mr. Washington, or failed to identify him?

MR. BUTLER: That's correct, I am.

THE COURT: On what basis?

MR. BUTLER: The basis that one, Mr. Bolding when he gave us his list of witnesses, did not give James Hanrahan as a witness. That name was never mentioned

to the jury. He knows where Mr. Hanrahan is. He's known, I've told Mr. Bolding in the month of November that Mr. Hanrahan was in jail in Los Angeles County. He's never asked me for any additional material as to where he is. He has not, to the best of my knowledge, sent any subpoena or asked any court process to take place to bring Mr. Hanrahan here.

THE COURT: Have you done that Mr. Bolding?

MR. BOLDING: The answers to these specific questions, have I sent subpoenas?

THE COURT: Yes.

MR. BOLDING: Yes.

MR. BUTLER: He subpoenaed James Hanrahan?

MR. BOLDING: That was not the question that was asked.

MR. BUTLER: That's what I'm --

THE COURT: That was my question.

MR. BOLDING: My question is, I have issued subpoenas, people are looking for Mr. Hanrahan, there are currently existing subpoenas out for Mr. Hanrahan, yes. This evidence will be presented, your Honor.

THE COURT: All right, go ahead, Mr. Butler.

MR. BUTLER: Well, your Honor, then I would simply ask --

THE COURT: How can I go beyond that representation, Mr. Butler.

MR. BUTLER: Well, your Honor, I think it's a fraud because Mr. Bolding knows where he is and there's an easy way to find Mr. Hanrahan and have him brought back. Now to say he has subpoenas out, fine. If he has subpoenas out, I assume, therefore, that they have been sent to Los Angeles County and they've got a Judge, he's asked a Judge over there to have him ordered back here habemus optimum testem confitantem areum [sic]. I wonder if he has done that because he knows he's in custody. I told him he was in custody. I told him the charges he was in custody on. To say he's got subpoenas out, fine, Judge, but it doesn't mean anything if you don't send them to any place where they can find him, and he knows or has a reason to know where that man is. And without James Hanrahan, I don't think he can get that stuff in because it's all

hearsay.

THE COURT: Let's do it this way, the only way I can keep it straight is point by point.

MR. BOLDING: Your Honor, I avow to the Court that there will be testimony offered and I firmly believe admitted, of everything that I stated this morning including the statements attributable to Hanrahan. I honestly and sincerely tell the Court that this is not a fraud. I honestly and sincerely tell the Court that Mr. Butler is going to be sorry for the remarks that he made because he's going to find out that this testimony is going to come in and, if he's going to be there, Your Honor, and that that's as far as I'm I think required to go at this time.

THE COURT: Mr. Butler, what was your next point on Hanrahan?

MR. BUTLER: On Hanrahan?

THE COURT: Yes.

MR. BUTLER: Your Honor, I'm assuming from what Mr. Bolding said he's avowing James Hanrahan will testify.

THE COURT: He hasn't said that.

MR. BUTLER: Well, that's what

worries me, Judge, because that's the only way you can get into evidence, properly get into evidence what James Hanrahan saw. You can't get in what somebody else, if Bunting was told something by Hanrahan or if Bolding was told something by Hanrahan, you can't get that in, Judge, it's hearsay.

THE COURT: I appreciate that, but there's so many hearsay exceptions and hearsay inapplicable provisions that how can we say at this point.

MR: BUTLER: I would request, Judge, because I frankly, don't want to go through three or four days of testimony to find out that Mr. Bolding cannot produce what he says he's going to produce. I would request that he put on an offer or proof at this time or at least explain what legal machination he's going to engage in to get this testimony in because it is clearly all hearsay without James Hanrahan and I know of no exception that would allow it in.

THE COURT: On the state of the record on this, it seems to me that on any particular witness's testimony that if the attorney tells the jury, "I'm

going to call a witness and he's going to say this and this or we're going to prove this, he said this and this and this" can you challenge that on a motion for a mistrial and say there's no way in the world he can prove that and does the Judge have to make that determination at this point of the trial?

MR. BUTLER: I think that would be the proper thing for this Court to do at this time. If it's a situation, Judge, where it just can't happen, and I think that's what Mr. Bolding has set up. The problem, Judge, is he's already told the jury those things and the Court can say to the jury at the end of the case when that evidence is not introduced, disregard that. Mr. Bolding's already told them, Disregard it, hold it against me" But then he has the audacity to say, Judge, Hold it against me and not George because that's the truth and that's what the evidence really is." I don't think I'm misinterpreting what he's saying. What he's saying is, "I may not get that in, it doesn't matter, ladies and gentlemen, because that's the truth and I know that's the truth. The Judge may not let you hear it for one legal reason

or another."

THE COURT: Which is an improper argument.

MR. BUTLER: And I think that's just wholly -- you think that's proper, Judge --

THE COURT: No.

MR. BUTLER: Or improper. No, that's what I say, I think it's wholly improper and I'm sure if the court reporter would read it back, that's what he said.

The other thing is, Judge, if we get in and bring all these witnesses in, what is going to happen is what was our fear from the beginning, and that is Rick Cooper is going to have to be a witness and Ed Bolding is going to have to be a witness because Ed Bolding talked to Hanrahan before the police did about this matter and he just told certain things, or he says he was told certain things by Mr. Hanrahan, and Ed testified about those things at the motion for a new trial.

Mr. Cooper is not on this case not because he was removed but because he feared he might have to testify. That was the same fear we expressed when Mr.

Bolding was reappointed, that he might have to testify.

I don't see how, if we're going to get into that, you can't -- it's just going to open those doors and all the people that I mentioned are going to have to testify. Mr. Bolding is going to have to testify because this guy Hanrahan, Judge, told a story to Bolding, he told a story to Bunting. He's told a different story to Dan Sokoll. He's told something to Mel Hill and Bud Davis, all these people testified, and if he's going to come in and testify, the State has a right to impeach him. The way we can impeach him is by putting all these people on the stand to whom he's told inconsistent statements. Mr. Bolding is one of them, so we're down the road, a week into the trial and then this happens. That's why I think at this stage of the proceedings it's incumbent upon the defense to indicate to the Court what it intends to do because I know this Court-- I don't want to -- I don't want to move for the mistrial because I want to get the trial on, but I feel I have to at this time because of what Mr. Bolding's done.

These other witnesses, Bibble and Holt, I know the subpoenas are out. We don't know where they are and I suppose we'll have to accept Mr. Bolding's statement that he figures he's going to get that in, but if those people aren't here, everything they said, that's hearsay because there's no exception I can think of to get it in, and I studied this carefully, Judge, because I was afraid this was going to happen.

MR. BOLDING: But --

MR. BUTLER: Go ahead.

MR. BOLDING: If it please the Court, your Honor, I'm willing to make this offer and that is I'm honestly trying to represent Mr. Washington. I am willing to go into chambers with the Court and with the reporter to tell the Court my strategy in this case, to tell the Court what I intend to do. If the Court agrees now that I am wrong and that I cannot do what I tell the Court that I can do, then I'm willing to say I'm wrong and you should grant a mistrial.

I am not willing to divulge that information to the County Attorney at this

time. The County Attorney has made a game of this case from December the 13th, 1970. They have tried to get at me through George. They have tried to get at me through Hanrahan. They have tried to -- they have hidden evidence as the Court knows and it's on record with the Supreme Court, they've hidden evidence. They have withheld evidence, they have not divulged -- they have made it a game, your Honor, I am willing to divulge to you my intentions in this regard. I stand by my previous avowal and I am willing to divulge to you, in the presence of a reporter, whatever -- I will answer whatever questions you ask me. Other than that I don't think I can be forced, at this stage in the trial, to divulge what I anticipate doing in this case, your Honor.

THE COURT: Mr. Butler, what was your next point on proving the -- hiding the evidence? How are you going to get in the evidence of the reversal as evidence? What materiality does that have? The whole door's been opened somehow.

MR. BOLDING: Sir?

THE COURT: I say the door's been opened in the opening statement and voir

dire to the jurors.

MR. BOLDING: In voir dire, of course, Mr. Butler talked about the proceedings four years ago, the previous proceedings, talked about the preliminary hearing and so obviously the door has been opened on that and the only way I know to rebut that is to prove what was done and one part of that proof, your Honor, is going to be is that I am going to offer into evidence the ruling of the Supreme Court in this case, State of Arizona versus George Washington.

THE COURT: What does that rebut?

MR. BOLDING: I'm sorry?

THE COURT: What does that rebut?

MR. BOLDING: Your Honor, that doesn't necessarily rebut, it shows, it corroborates that there is motive and bias and, I don't want to say illegal conduct, misconduct on the part of the County Attorney to show that that lends some credibility to the evidence that was withheld, your Honor, and then, of course, there are cases on that where I can show motive and bias of the prosecutor in a case and show misconduct on the part of the police and show misconduct in order

to get that type of evidence to the jury, and so my anticipation is I will mark and I will do it now except I don't have a clean copy. That's the only copy that I have that I put on the bench. I will be offering that into the case if Mr. Butler says that that's not the best evidence, that's hearsay, then I anticipate that I will subpoena the author of that opinion as well as the other members of the Supreme Court to testify in this regard.

MR. BUTLER: Judge, may I be heard.

MR. BOLDING: And I'll prove it that way and/or I will prove it by Mr. Stevens, Mr. Cooper, by, I guess that's about it, your Honor.

MR. BUTLER: Judge, it escapes me as to how the Supreme Court decision in this case or how a ruling of Judge Truman is in any way material to the issue that the jury is to decide, and that issue is the guilt or innocence of George Washington, Jr. The Supreme Court and Judge Truman have said, "Supply certain evidence to Mr. Bolding." That evidence has been supplied. Mr. Bolding then has the opportunity to utilize that evidence, if he can. That's his remedy, but what he's going

to try to do, and it's obvious by his argument about four years and two days and eight hours. What he wants that jury to do is say, "Look, this guy has spent that long a time in prison because the prosecutor is guilty of misconduct" and so, "You shouldn't find him guilty now."

All of that stuff, Judge, is absolutely totally immaterial to the guilt or innocence of George Washington. He has, Mr. Bolding has the evidence he says was withheld. He has more now because he's gotten a log of things I was not required to turn over to him.

The only reason he can want that in is to get the jury so mad at the State, they're going to say, "Well all right, George has suffered enough and even if he's guilty, we're going to let him off and find him not guilty" because that evidence is totally immaterial to the issue at hand. That's a whole different issue he wants to have heard in this Court, that he wants this jury to decide.

MR. BOLDING: Your Honor, please the Court, it's totally material, totally, it corroborates the evidence that will come forward on the stand, the evidence that

will be brought to the jury. Mr. Butler has cast the inference, your Honor, in his voir dire and the Court heard it, about the four-year-old proceeding, the two proceedings four years ago. I had to, then, go into the fact that the jury knows, then, that there was a trial. The jury knows obviously the man was not found not guilty and, therefore, I have to go into it. And to cast the inference that there's a trial, I have to show them the reason. I can picture it if I don't go into this type of information, I can just picture Mr. Cooper - I'm sorry, I apologize, Bates.

MR. BUTLER: I won't accept your apology because I don't thing there's anything wrong with Rick Cooper and, and you know it.

THE COURT: Go ahead.

MR. BOLDING: I can picture Mr. Butler making the argument to the jury there was another trial, twelve people convicted this man, same evidence --

THE COURT: He's not going to make that argument. It's an improper argument and he knows it's an improper argument.

MR. BOLDING: It's improper for him

to insert the fact that there were previous proceedings in this case.

THE COURT: I don't think so.

MR. BOLDING: Well, that's a difference in --

THE COURT: Slipped out, made maybe a little too much out of it without objection, it went a little bit too far.

MR. BOLDING: Well, I couldn't stand up and object at that time, your Honor, I really couldn't. But at any rate, this type of information does corroborate the evidence that will be brought.

THE COURT: I cannot conceive how the opinion of the Arizona Supreme Court in this case would be admissible on any basis whatsoever.

MR. BOLDING: I'll really try to do some additional work, then your Honor, to try to find some law for it. I believe it would be admissible. It's corroborative of the testimony that the jury will hear.

THE COURT: I'm afraid, and I don't know how we stop it, we're getting to the point where we're trying the County Attorney's office and the County Attorney's office, conduct, whatever it was in the last case, and I simply, I am not going to

allow it if this trial goes on and I'm very sorely tempted to grant the State's motion at this time.

MR. BOLDING: Well your Honor, that's -- I will be -- sorry if that happens and if the Court tells me now that I cannot examine any witness about that Supreme Court decision until I furnish you some law that says yes, that can come in, then I will abide by that decision, your Honor. I will be working on it and I would like to reserve my right to present that to the Court outside the hearing of the jury at at another time. I just, I believe that it is, it's credible evidence. It's, thinking, you know, off the top of my head here, it's opinion evidence from experts. It's evidence that I believe is truly corroborative of the evidence that the jury will hear and I would certainly like to reserve my right to present some, if I can find you some written law, which would allow this type of testimony, your Honor, as evidence.

I'm not being facetious, I'm not being fraudulent, I'm trying, telling the Court that I believe firmly in my

mind that it is corroborative.

THE COURT: I accept your avowal of what you have told the jury the evidence would prove.

MR. BOLDING: Yes.

THE COURT: And that as an officer of the court believe sincerely that you can prove that.

MR. BOLDING: Yes.

THE COURT: I accept that on the factual matters but somehow when we get into the area that Mr. Butler has objected to on your argument regarding misconduct of the County Attorney's office which was disapproved by the Arizona Supreme Court which resulted in a prior conviction of Mr. Washington, which resulted in his having spent four years and two days and eight hours or whatever in custody, I just can't see where that's proper.

MR. BOLDING: Does the Court feel that at this time actions on the part of representatives of a party in a criminal action which shows a malicious intent, which shows a misconduct, is not some evidence of the credibility of what was being tried, what they tried to suppress, in other words, shows a bias and motive on the part of a witness like Sergeant

Bunting, shows a bias and motive to, you know, insofar as the credibility is concerned, your Honor.

THE COURT: If you can prove that a certain witness, and let me say Sergeant Larry Bunting, just to pull a name out --

MR. BOLDING: Hypothetically.

THE COURT: Out of the air because it's been mentioned, and if you can elicit facts that he failed to bring such and so to the attention of the authorities, that might very well be admissible to test his credibility. I'm not sure but I think you're going much farther than that.

MR. BOLDING: I'm really not, your Honor. I'm showing misconduct on the part of the State of Arizona by and through its agents. I have a right in a criminal case to show that. If George had gone out and say had been on bond and say had gone out and talked to a witness and said, "Look, don't testify, I'll pay you $500 if you won't testify." that's the first thing this man would have tried to prove, the prosecutor would have tried to prove, your Honor, and that would be admissible. This is admissible because what happened in this case was, the State of Arizona,

through its agents, Bunting, Hill, Davis, Cooper, Stevens and Rose Silver, went to a witness and said, "If you won't testify in this case truthfully and if you will bust Bolding, we will give you probation." Now, that's what I'm trying to prove, your Honor and that's what I am trying to prove, and that goes directly to the credibility of the State's witnesses, your Honor, and to the evidence itself.

THE COURT: Are you talking about direct impeachment, Sergeant Smith is on the stand, you ask him, "Did you not confront Mr. Whatever his name is in custody and ask him to --"

MR. BOLDING: Yes

THE COURT: "--to testify thus and so?"

MR. BOLDING: Yes.

THE COURT: That would be proper, wouldn't it, Mr. Butler, to impeach that witness, or would it?

MR. BUTLER: The last statement that Mr. Bolding has made are not true. Dan Sokoll testified, all the people we talked about have testified. They have denied what James Hanrahan said at this time. Judge, we've got a tape and it's

somewhere in evidence in the courthouse where James Hanrahan is telling Bunting, that Ed Bolding wants him to commit perjury. We've got that. That's got to come out if we get into that. We do that and he's a witness.

You know, another thing that just perplexes me is, we've only had, since they set a trial in September, we've only had four months to have gotten into this and had a court decide all this but here we are at the twelfth hour and Ed Bolding is saying, "I want to do all these things."

I don't think any of the things he's talked about, Judge are Material. I don't think they're proper impeachment. Larry Bunting is going to say, "I don't know what was given to Ed Bolding." He's going to say, "That's not my responsibility" and he's right, it's the County Attorney's responsibility. The County Attorney acted under law as he understood it. The Supreme Court said he made a mistake.

The Supreme Court didn't say and a jury should consider that because the Defendant obviously didn't do it. The Supreme Court said, "Give him what you didn't give him the last time." and what

the Supreme Court's decision concerned and what Judge Truman's decision concerned, was the statement of Rodriguez when he said, it was a Mexican male that committed the robbery." Which statement we know could not be the truth. And all Mr. Bolding wants to do is relitigate everything now. I'm just astounded.

MR. BOLDING: Well your Honor --

MR. BUTLER: I know that's not material to anything.

MR. BOLDING: Mr. Butler has not answered the question as to whether if George had gone, or if I had gone to a witness and said, "If you will testify in a certain way I will pay you some money or do something for you or something like that." Mr. Butler certainly agrees that that's one of the first things he would be trying to prove. That's what I will be proving here, your Honor. The train runs both ways. there are two sides to that coin and I don't see how I can be precluded now.

Again, if -- I'm willing to not mention -- not question anybody including Rick Cooper when I call him to testify about the Supreme Court decision and I'll

not even offer it into evidence. I'll not mark it and have it identified unless I can convince the Court in a hearing outside the jury that it is admissible and I'm not prepared to do that right now. I think it is, it's corroborative of that type of evidence.

Other than that I just don't see how the prosecutor's surprise and astonishment has any bearing on the situation and again I just can't answer it, the question as to why it's improper to show it when the State does it when the State does it when it's not improper to show it, when the defense does it and I just think, like as I say, the train runs in both directions, your Honor.

MR. BUTLER: Judge, may I ask Mr. Bolding a question?

THE COURT: Yes.

MR. BUTLER: Mr. Bolding, if you were to call Mr. Cooper to testify, would one of the questions that you would ask him be, "Did you supply the statement of Alonzo Rodriguez to me as defense counsel four years ago?"

MR. BOLDING: I do not know.

MR. BUTLER: Well, it seems to me

what he's leading up to. He's going to try to show misconduct on the part of the County Attorney and again, I don't see how that is at all material to the guilt or innocence of the defendant. He's got everything now that he's wanted. He's gotten more than we were required to give him and I don't think it's proper impeachment in a criminal trial where there's a new trial to show that the first time out the County Attorney's office, or the prosecutor didn't give the defense attorney something he was entitled to because all that can be introduced for is to show, look, they messed up last time and because of that you should find him not guilty.

THE COURT: I think Mr. Bolding, in essence, if what you say is correct, then the Supreme Court should have directed that the judgment of acquittal be entered in this case because theState of Arizona, through its agents, denied this man a fair trial the first time, because the other side of the coin is, his remedy is a new trial because of the misconduct, but I don't think you're entitled to prove all this misconduct if

such is the case, to impeach every witness, and I think that's what you're saying to me.

MR. BOLDING: Your Honor, it's admissible for the State as they did, trying to do with Mr. Hirsh now in another case, to say that there was, through an investigator, an investigator talked to a witness, is it impermissible for the State to try to say that the defense is guilty of misconduct and to show that in a trial? That's admissible so why isn't it admissible the other way? I really don't understand, your Honor.

THE COURT: Again, it depends on, you know, the proposition is too broad.

MR. BOLDING: Well, it is too broad but what I'm saying is, Your Honor, that I will be proving that there was a deal offered to Mr. Hanrahan to not testify and that clearly goes to the weight to be given to the evidence, your Honor, and that's exactly what they would be trying to prove if I had gone out and tried to get somebody to make a deal and I guess he's going to try to prove that I went out and tried to get Hanrahan to make some kind of deal. I don't know whether he's

going to try to do that, but that's what I will be trying to prove, your Honor, That's what I will prove, not be trying to prove. It's clear from the record, it's in the evidence. It's in previous hearings. It's clear that that's exactly what happened and Mr. Butler can't disagree with that situation, that I will be proving that. Now, whether the jury believes it is another story, but it goes directly to the weight of the evidence, the weight to be given to the evidence, your Honor.

THE COURT: The weight to be given to every bit of evidence admitted in --

MR. BOLDING: No.

THE COURT: --this trial.

MR. BOLDING: No.

THE COURT: What evidence.

MR. BOLDING: Only to the evidence to show some corroborative value for Hanrahan's testimony, No. 1, to show, to impeach by actions other State agents who might testify here including Bunting, Cooper if he's calling Cooper. It's impeachment testimony, your Honor, and I will be proving it. And you know when the defendant, if the defendant did the

same type of thing, that would be the first proof we'd be hearing from the witness stand, I promise you, and I just don't believe that I can be precluded, therefore, from offering the same type of impeachment testimony. I'm doing it in good faith and I'm doing it openly and I'm doing it in defending this man and I just, it's just proper impeachment testimony, bias, motive, to show that they're out to get George, to show the lengths that they would go to to try to get him, to show that they would try to cover up testimony. That is clearly, goes to the credibility of the witnesses to the type of weight that's given to the testimony, your Honor and I'm just again, as I say, I'm willing to tell you what the situation is and what I'm going to do and I think you will agree with me, your Honor.

MR. BUTLER: Your Honor, I don't disagree, he has a right to call James Hanrahan. He has a right to ask James Hanrahan, "Do you know anything about this case?" and Mr. Hanrahan would say,

Yes, I do and this is what I know." and he may have a right to say, "Did the prosecution or the State try to get you to lie?" and then we introduce our evidence that Bolding tried to get Hanrahan to lie, according to Hanrahan because we have a taped statement of that. And Mr. Cooper gets up and denies that he tried to get Hanrahan to lie. Then I call one of the counsel for the defendant to ask him about it. He puts his own credibility in issue. We get into that and Mr. Bolding's credibility will definitely be an issue. There's no way around it, but I can't agree that some of that is competent evidence. That's why Rick Cooper is not trying the case. That's why we oppose Mr. Bolding being reappointed because we didn't want to have this case come to trial, empanel the jury and have him pull this stunt, but our request was denied.

But then on the other hand to say that he can introduce a Supreme Court decision because it's expert evidence or expert opinion and the jury should say, "Well, for heaven sakes, if the Supreme Court said it was improper, it must be and the man must not be guilty." that's

obsurd [sic] and he's saying both things and they said the remedy is a new trial. That's what he's got and they didn't say the man should be let go. That's what Mr. Bolding wants, and he wants that jury to let him go because of misconduct.

MR. BOLDING: I want the jury to come back with a not guilty because George is not guilty. It's not a stunt, your Honor. I'm within my legal rights to proceed the way I've proceeded so far. I told the jury what evidence I intend to put on and, you know, the -- Bates has told them what evidence he intends to put on. If he doesn't put on that evidence, I can't get a mistrial.

MR. BUTLER: Why not?

MR. BOLDING: In your opening statement if you say, "I intend -- I will show you A, B and C and you just show A and B, you say I can get a mistrial.

MR. BUTLER: You haven't stated, a man copped out to him about the murder, I can't prove it? You bet your life I think you can get a mistrial because I've already poisoned the minds of the jury.

MR. BOLDING: That's tremendous. If you honestly intend to put on evidence, and

I do honestly intend to put on evidence and again, I make the offer that I will show the Court how I intend to do that.

THE COURT: Motion for mistrial will be denied.

MR. BUTLER: Your Honor, is Mr. Bolding going to be able to introduce evidence as to the Supreme Court too?

THE COURT: I've made no ruling on the admissibility of any evidence Mr. Bolding has asserted he's going to offer, Mr. Butler. I am accepting his avowal that the evidence would be admissible. I'm hard put to see how some of it would be admissible and I'll rule on the offers at the time they're made.

MR. BOLDING: Well, now, I didn't avow that the Supreme Court thing would be admissible. As I say I think it would be. I'm not making avowal that it is, your Honor, I want to try before I mention it to anybody I will try to bring that to your attention.

MR. BUTLER: He's already mentioned it to the jury, that's the problem, and so what I'm going to have to end up having to do, is we're going to go through a week or so of trial he's going to come up and

he's going to try to introduce this stuff. He's not going to be able to do it. I'm going to have to get up and ask for a mistrial because they've heard it.

MR. BOLDING: You have a right to do that, Mr. Butler -- I'm sorry, your Honor, I think Mr. Butler has the right to do that. He can make the motion any time he wants to , your Honor, I just was gratuitously saying that I would present that to you. I will go ahead, then, I will try to pursue it and I will try to get it in without a previous hearing, your Honor. If the Judge tells me it's not admissible, then obviously I can't use it. I was gratuitously trying to say that I would try to present you with some law to show that that type of evidence would be admissible, your Honor.

MR. BUTLER: Judge, I'd at least request that because I don't want to go down the line and have to ask for a mistrial. I know that you don't want that to happen.

THE COURT: No, at least on that one point, already testified, I will direct you to present me with some authority that that's admissible before you offer it

before the jury.

MR. BOLDING: Or some theory or law.

THE COURT: Yes.

MR. BOLDING: O.K.

MR. BUTLER: Is Mr. Bolding agreeing, Judge, that if he is unable to introduce evidence as to the Supreme Court decision, he agrees I've got a right to a mistrial?

THE COURT: No, he'as agreeing that you have a right to make a motion.

MR. BUTLER: Well, I guess I can make it whenever I want but --

THE COURT: I think if I granted you a mistrial at this time and I was not on sound ground and you have objected --

MR. BUTLER: That is something, your Honor, I'm willing to risk.

THE COURT: We'll stand at recess for about five minutes.

(RECESS)

(Proceedings resumed before the jury not transcribed.)

(EVENING RECESS)

X. Mr. Butler's Renewed Motion for Mistrial and Argument Therefore On the morning of January 10, 1975.

[Pages 133 - 147]

(Following proceedings had out of the presence of the jury):

THE COURT: Mr. Butler, you indicated you had motions to make outside the presence of the jury?

MR. BUTLER: Yes, your Honor. Thank you. My motion is for a mistrial. I don't know, your Honor, if it's properly for reconsideration of the one I made yesterday or it's new. I think it's probably a little of both but I want to refer the Court to Rule 314 of the old rules of criminal procedure. I have a copy of that rule if the Court wishes to see it and I have a copy of some other things I'll be citing.

The particular language I'm talking about, your Honor, states that when a new trial is granted, the new trial shall proceed in all respects as if no former trial has been had, and the last sentence, former verdict or findings shall not be

used or referred to in evidence or argument on a new trial.

In Amjur they talked about, 58 Amjur 2d, 228, talk about any reference at a new trial, the result of a former trial or the same cause is improper. It should be at 58 Amjur 2d, 228 and the rule is 314. The Amjur citation goes on to indicate that the jury who are empanelled at the new trial must act upon their own responsibility and according to their own review of the testimony which is submitted to them entirely uninfluenced by the action of any of the jury.

Your Honor, I think that the rule 314 is mandatory, it says the former verdict and findings shall not be used. It doesn't say a defendant may waive that. I think what we have, your Honor, is a situation where, after the conviction of the defendant in this case, he has an excellent appeal point in that the jury was improperly influenced because they were told of the former conviction and, which I think defense attorney can argue on appeal, Mr. Bolding should not have done and it caused the defendant to not receive a fair trial.

I would also like to cite to the Court case of State versus Kinzie which is a Washington State case, 1972, again holds that the retrial of an action proceed de novo and places parties in the same position as if there had been no trial in the first instance. That case, your Honor, cites the case of State versus Young which is found at 200 Kansas 20, also at 437 Pac 2d 820 where the Supreme Court of the State of Kansas indicated that where defendant files a motion for a new trial and the same is granted by the district court, or as here by direction of this court upon appellate review, the State and the defendant are placed in the same position as if no trial had been had. At the new trial all of the testimony must be produced anew and the new trial must stand or fall on its own merits. Any reference, your Honor to the old trial is improper according to that case also.

Now, your Honor, the research that I did last night on this issue, the only case that seems to be directly -- I don't know if I can show it's directly on point but it's the closest thing that I could find in an extensive review of the law,

is a case called Smith Versus Smith which is cited at 176 Southwest 2d 647. It's a Missouri appeal case, and that case found that where a motion for a new trial is sustained, it thereupon becomes the duty of the court to proceed as in the first instant with no advantage to be taken of the former decision or the action of the court in granting a new trial, and it's the position of the State, your Honor, that Mr. Bolding's reference to a Supreme Court opinion in which he indicated that the Supreme Court found misconduct on the part of the County Attorney because of an alleged suppression of evidence and, therefore, a new trial was granted, Mr. Bolding is attempting to utilize the action of the Court in granting the new trial for his benefit, and I think the Court, at least I intended to, give the Court a copy of that Smith v. Smith case, a 1944 case, your Honor.

There's a case, your Honor, of Olds, I think it is, Your Honor, and I can't determine, that's the last -- that's the defendant's name, I can't remember the first because it's not xeroxed but it's found at 120 Northwest 2d 469. That

case, your Honor, refers back to the CJS citation at 226 for the proposition that a new trial is a trial de novo as if there had been no previous trial and that the case used to be conducted on the basis of what is presented at this trial with no hearing to be had what happened in the past.

Now, in the case of Leaventhal Versus Baumgardner at 209 Georgia 404 indicates that where a new trial has been granted, the case stands ready for trial as if there had been no trial. The effect of the grant of a new trial by this Court is to require the case to be heard de novo unless specific direction be given in regard thereto.

Your Honor, I do not believe we have any specific direction being given in regard thereto and if the Supreme Court would have said this opinion can be used in the evidence to indicate there was misconduct on the part of the County Attorney, I think they would have done that. That's not the law.

Your Honor, it's difficult to find cases -- I dare say it's impossible to find cases where courts have considered whether

or not an appellate decision could be used as fact. The CJS and Amjur citations, the one I'm referring to now is CJS, 21 CJS at paragraph 122 which deals with the operation of in effect judicial opinions, indicates that an opinion by a court or Judge is merely evidence of the law and is not the law. It is not part of the record.

Mr. Bolding would have this opinion used as part of the record and he would have it used as more than law. He would have it used as fact and that is totally improper.

Fortunately I was able to have some assistance in my research last night. Three other attorneys and none of us were able to find this elusive case that Mr. Bolding refers to that he said he would produce for the court indicating that in such a situation as we have here it would be proper to use the Supreme Court decision in the manner that he wished.

Also, your Honor, I'd like to remind the Court that under the rules of the Supreme Court of the State of Arizona, memorandum decisions shall not be regarded as pertinent or cited in any

court except for the purpose of establishing a defense of res judicata, collateral estoppel or the rules of law -- excuse me, or the law of the case, and that's rule 48, paragraph C.

We have a memorandum decision from the Supreme Court in this case. Judge Truman simply found in her ruling that the defendant had been denied due process. The Supreme Court affirmed her decision and they wrote a memorandum opinion. According to the rules the Supreme Court memorandum decision shall not be regarded as pertinent or cited in any court except for the times that I've indicated.

Now, your Honor, it seems to me that what we have here is a situation where, first of all, if this Court does not require Mr. Bolding to at this time indicate in what manner that he will introduce the Supreme Court decision, what we have -- what will result is after about eight days of testimony, the Court will be even more reluctant to grant a mistrial if Mr. Bolding is unable to do it. I know I would be more reluctant to do that because we'll have eight days of testimony in.

I think now is the time the decision should be made as to whether or not Mr. Bolding has the right to introduce evidence of the Supreme Court decision in granting or affirming the lawer court's decision in granting a new trial. It's the opinion of the State that no curative instruction given by the Court could in this case adequately cure the damage that has been done by Mr. Bolding.

The State, the position of the State has been so prejudiced by his illegal and improper argument that the State feels that it is necessary to have a mistrial granted now. I think, your Honor, that what Mr. Bolding is saying, he is analogizing, or he's trying to analogize the law that says if I had evidence in this case, that Mr. Washington tried to suppress evidence, suborn perjury, do anything like this, all of these things are evidence of consciousness of guilt and I would be able to introduce those. That's what the law says.

If Mr. Bolding had evidence that the State or its agents tried to obstruct justice, tried to suppress evidence through the individuals that have first-hand

knowledge of that, they could impeach the witness, perhaps. If he can prove that Larry Bunting tried to get a witness to lie that perhaps is material to Bunting's testimony depending on what Bunting's testimony is, but what happened four years ago and to be able to say that he is allowed to relitigate what was heard at the motion for a new trial and had this jury hear that allegations were made, that the State tried to suppress evidence which in turn allows the State to show Mr. Bolding tried to suborn perjury and then to throw into that mish mash the opinion of the Court, I think would be totally improper.

That judicial opinion of Judge Truman and of the Supreme Court has absolutely nothing whatsoever to do with the guilt or innocence of George Washington which is the only issue we are to be trying in this case.

Now, I know the Court is familiar with the case law that indicates that prior bad acts of a defendant are inadmissible in a trial against him except under certain limited circumstances, and in trying to analyze the situation we have here, it seems to me that the same

philosophy should apply. If the State is guilty of prior bad acts, they should not be admissible unless they are relevant to the guilt or innocence of the defendant.

And Your Honor, I don't know if -- throughout the whole trial, I guess Mr. Bolding seems to think this is a big joke. I don't consider it that way.

MR. BOLDING: I apologize, your Honor.

THE COURT: O.K.

MR. BUTLER: I think what we've seen here, your Honor, is continual conduct on the part of Mr. Bolding that he has apologized for, objections have been made and sustained and Mr. Bolding has told us that he will not do them again. I'm afraid the entire trial is going to be conducted that way.

Your Honor, if the Court rules in a criminal case that a statement of a defendant is voluntary, it may be submitted to the jury. That jury is not entitled to consider that ruling as factual evidence of the voluntariness of that statement. I would not be allowed to say: "Ladies and gentlemen" -- and we have a voluntariness issue in this case which Judge Truman ruled on in the last case.

She said the statements of the defendant were admissible. I would not be allowed to say: "Well, look, ladies and gentlemen, Judge Truman says that was admissible. Obviously, you should be able to consider that in deciding whether or not that statement was voluntarily made." That's just not the law but that's what Mr. Bolding wants to do here. That's how he wants to use the Supreme Court memorandum opinion.

If the Court rules, your Honor, that a witness may identify the defendant as the perpetrator of a crime, a jury is not entitled to consider that ruling as evidence of whether or not that witness properly identifies the defendant. I'm not allowed to say, "Well look, Judge Buchanan, allow Alonzo Rodriguez to testify." We had a hearing on that, so obviously what he's saying himself, I'm not allowed to say that. But that's how Mr. Bolding is attempting to use the Supreme Court opinion.

I think, your Honor, that the proper law is cited in Smith v. Smith and that is that where a motion for a new trial is sustained, it therefore

becomes the duty of the Court to proceed as in the first instance with no advantage to be taken of the former decision or the action of the Court in granting a new trial. I cited that case previously.

Again, your Honor, assume that for the sake of argument, that Mr. Bolding would be allowed to show that the State tried to suppress evidence or that the State -- they're not allowed to show that the State did try to suppress evidence. McCormick and Udall both indicate that this presumption of an adverse nature of evidence not produced applies to evidence willfully suppressed rather than evidence not produced in court, and I'd like to cite to the Court the case of People versus Washington, 113 Cal ap 352, also found at 298 Pac 121 and People v. Lopez, found at 336 Fec 2d 614.

At the motion for a dismissal Mr. Bolding alleged that the State was -- had willfully suppressed evidence in this case. He said that's what Mr. Cooper had done. He cited a case for the proposition that in such a case where there is willful suppression of evidence by the State, and the way I remember it the case is and it

causes, or if there's any other act like that, it causes a mistrial, in the first trial, that you can't try him again at all. He asked the Court to take that ruling and find that it should apply for a motion to dismiss after a new trial had been granted. In other words, he asked Judge Truman to find that we had willfully suppressed the evidence and because it was willful, the case should be dismissed. She did not dismiss the case. She said his remedy was a new trial and I would submit, your Honor, that the only logical inference from her decision is that if there was a suppression of evidence, it was a negligent one and those two cases that I cited, the people versus Washington and people versus Lopez, all indicate that it's only where there's a willful suppression that you can even have an adverse, or presumption of adverse nature of evidence not produced.

McCormick at section 273 page 660 to 661 indicates that before you can have that adverse presumption, circumstances of the act must manifest bad faith, mere negligence is not enough for it does not sustain the interence of

consciousness of a weak case.

And that, your Honor, there's always, those citations deal with admission by conduct. I was unable to find any case where they said those philosophies applied against the prosecution. All of the cases that are cited apply in -- against a defendant or apply in a civil case. I do not believe Mr. Bolding can show this court one case where a defendant was allowed to introduce evidence of attempt by a prosecutor to willfully suppress that evidence and where a Court would have ruled on that, it's not there, Judge.

If he can show, I think he can show that -- if I hide a witness today, I think he can show that. I don't think he can show what happened four years ago because he's got all the information now. The Supreme Court says that's his remedy, give it to him, he's got it. And what he is trying to do is ignore the State of Arizona in Rule 314. They said the former verdict or finding shall not be used or referred to in evidence or argument on the new trial.

Now, I assume that Mr. Bolding is going to say, "Mr. Butler opened the doors because of a statement" -- my statement

about prior proceedings.

Mr. Bolding told this Court that he intended to put in evidence of Luke Murray. Mr. Bolding has indicated to this Court that Mr. Murray is dead. The only way he can put that in is to use testimony at the prior proceedings -- excuse me, at the prior trial. In that testimony at the prior trial there was reference to Mr. Murray's testimony at the preliminary hearing. I knew that when I made my opening statement. The Court knew that. I properly called the instance when Mr. Murray testified previously, a prior proceeding. I did not call it a trial. For me to call it a trial would have been improper. Mr. Bolding decided to go further and call it a trial. Then he decides to tell the jury about the conviction. And I would submit, your Honor, Mr. Bolding has gone so far in his argument that he has opened the door at this stage of the proceedings for me to talk about the fact that Mr. Washington was found guilty the last time by twelve people just like those people that are in the box because that's what he said. He, apparently, is going to imply that he was found guilty because

we didn't give him all the evidence. That to me indicates, look, ladies and gentlemen, even with that evidence that jury four years ago would have still found the same verdict.

I think that because of Mr. Bolding's argument the case has gotten completely out of hand. I would suggest to the Court, your Honor, a mistrial is a manifest necessity at this time because of the conduct of Mr. Bolding and I would request that my mistrial motion be granted.

THE COURT: Thank you. Mr. Bolding.

XI. Mr. Bolding's Response to Mr. Butler's Motion for Mistrial on January 10, 1975.

[Pages 147 - 152]

MR. BOLDING: I don't think I'm prepared to argue at this time, your Honor. I'll argue it if the Court wants me to but I don't think I'm prepared to at this ti- since I did not have four attorneys working on this matter last night and I just -- I thought that finally the County Attorney would abide a ruling of the Court and not continue to bring them back up but evidently in the future I should remember that that's not going to happen.

All I can say, your Honor, is to reiterate most of what I stated yesterday to the Court. One of my most learned friends in the law in this area tells me that what I should do this morning is to, or told me what I should have done yesterday was to just state, "Well, I object to a mistrial" and then let the Court grant the mistrial because it would clearly be that jeopardy has attached, and so I probably ought not to care one way or

another.

I want to clear up a few things that the prosecutor talks about that are clearly not applicable here. I assume that Smith v Smith is a civil case, I'm not sure of that but I assume that, it sounds like it is.

No. 2, an illusive case that he's talking about, Mr. Butler evidently didn't hear what I was saying yesterday because I was talking to the Court about the plea of once in jeopardy when I told the Court I will produce a case, and I will produce that case for the Court, to show that it is a jury question, on the once in jeopardy theory. I did not ever tell this Court or will the Court this morning that I can produce a case saying that the memorandum decision of the Supreme Court is admissible into evidence. I did tell the Court yesterday that before I questioned any witness about it, I will, and I think the Court instructed me to bring that to the Court's attention outside the hearing of the jury which I still will do. I have not worked on that because I'm not at that stage yet where I think it's necessary to bring that into evidence. That will be brought into evidence only upon

the testimony of Mr. Cooper, Mr. Stevens, Mr. Dingeldine, Mrs. Silver, if those people are called as witnesses.

This is a substantive defense of the defendant in this particular case. These rules were passed, were in force, the cases are all raised by the defendant, they are in force as protective of the defendant, your Honor. It is grounds for a mistrial if the prosecutor stands up and says: "This man has been previously convicted of some-- of this crime for which he's charged." That's grounds for mistrial on request of the defendant, probably grounds for mistrial if the prosecutor refers to prior proceedings in this case which he did. I did not make a motion for mistrial at that time.

The proper way to introduce prior testimony is to say: "Mr. Smith, you have given prior testimony -- you have given prior sworn testimony that was reduced to writing, is that correct, you did that on December 13, 1970" whatever the date is. You don't, and the prosecutor doesn't and cannot refer to other proceedings. It's grounds for mistrial when a prosecutor refers to preliminary hearing which he

did in his opening, which he did with Mr. Choat. It's grounds for a mistrial on application of the defendant when the prosecutor talks about prior proceedings, a preliminary hearing, because obviously the man was held to answer, obviously the man was convicted at a previous trial four years ago, a previous proceedings, the prosecutor says, "Four years ago."

Now, you know, the juries are not dummies. They certainly can't leave their common sense at home and know that he's referring to a prior trial. I did not make the motion for mistrial. I perhaps should have done so at that time because I'm not happy with the jury and I would certainly, if Mr. Butler, if at that time I would have made the motion for mistrial, I probably could have had the thing granted and then we'd be back starting again.

This is a -- well, so as a consequence of that, I may have waived my appellate point. I may have waived an appellate point about the prosecutor talking about the prior proceedings. At any rate I certainly, the only appellate point that I might have would be Mr. Butler's opening statement where he

referred to four years ago and prior proceedings had in this case, which he's not allowed to do. I would have that, I think I would preserve that appellate point although I did not object to it at that point. I think that's fundamental and I don't believe I can waive that.

Anything that I have done and I don't see how I can complain about, if there was an error which I certainly do not agree, took place but if there was one and I think that's called something like the doctrine of created error and I am not certainly entitled to benefit if I insert error into the case. Neither is the prosecutor entitled to benefit if he inserts error into the case. This goes clearly, your Honor, to a substantive defense of Mr. Washington, this goes clearly to an abuse of power to show the reasons for the charge being filed against Washington and the resultant action after the filing of the charge to show that they were correct in filing the charge. It results in improper conduct on the part of the prosecutor, not Mr. Butler, and on the part of several of the prosecutors.

The fact that they would suborn perjury, the fact that they would wire a

witness to try to see if someone suborning perjury and to try to set me up to the fact that prosecutors would go as far as they did and promise one of the witnesses probation if he would not testify in this particular case, which will be proved.

All of that certainly, your Honor, goes directly to our substantive defense, to the reasons for being here today.

Again, I haven't had the opportunity of having any lawyers working on this matter. I think the Court would be, if the County Attorney is advising the Court to grant a mistrial, I think that advice is ill conceived at best and advice that's given only for the purpose of knowing that the case is going at this particular point a little bit against the County Attorney, so they call out the troups [sic] of four or more lawyers and try to find some way to get out of the mess that they're in at this time by trying to get the Court to grant a mistrial, and for that reason and for all those reasons, I would again ask for a little bit of time to get some legal matters together if necessary, but if the Court feels it's necessary, but I do ob-

ject to the granting of the mistrial at this stage.

THE COURT: The only authority I'm concerned with that was cited to me, Mr. Bolding, is rule 314 of the old Rules of Criminal Procedure and I find that rather definite in statement.

MR. BOLDING: Do you have annotations.

THE COURT: Are there any cases cited under that rule, Mr. Butler.

MR. BUTLER: They all talk, I believe, your Honor about double jeopardy. I didn't look at the annotations, someone else did. That's the way I remember being told that.

THE COURT: There's an old criminal rule volume in chambers, Andy.

XII. Colloquy Between Judge Buchanan, Mr. Butler, Mr. Bolding, and Mr. McDonald Regarding Mr. Butler's Motion for Mistrial on January 10, 1975.

[Pages 152 - 160]

MR. McDONALD: Your Honor, just one thing, rule 314 -- well, perhaps the Court would like to get it here.

THE COURT: Go ahead.

MR. McDONALD: 314 in the argument Mr. Butler raises on its face seems to have some soundness to it, but it's clear that the purpose and the manifest purpose of 314 is to keep the prosecutor from standing up and saying: "Twelve men convicted this man before, how in the world can you let him go." It's a defense protective, as Mr. Bolding says, if there had been any error which I do not think there has been, he does not think there has been but if there has been any error whatsoever, it's clear that the doctrine of created error would control and we've maybe waived that point, appellate proceeding, but it's inconceivable that, at least it's incon-

ceivable to me the County Attorney can come in and argue that four years ago the fact that the defendant, the material witness was suppressed, the fact that the County Attorney attempted to wire an individual, all that parade of horribles, it's inconceivable to me that the County Attorney can say, "That can't get to the jury. The jury cannot know about that." It's just the most absurd thing I ever heard.

THE COURT: Mr. Butler, do you want to respond?

MR. BUTLER: Your Honor, I'm not sure how familiar this Court is with this business about wiring a witness. I assume this Court knows that when this witness was wired, he was wired after the County Attorney's office checked with the Presiding Judge and checked also with another Judge of the Superior Court and that procedure was undertaken with their approval. Assume that we get into that.

Mr. Bolding told Judge Richey, it's my understanding it was Judge Richey and it may have been Judge Truman, but it was on October, I believe it was October the 24th of this last year when Mr. Bolding was appointed. There was a motion

anyway about who was going to defend George Washington. Randy Stevens represented the State -- Jim Howard represented the State, excuse me. It's my understanding at that proceeding Mr. Bolding told the Court he had no intention, at least no intention at that time of calling James Hanrahan. Apparently, Mr. Bolding knew at that time that the reason he wouldn't be calling this man was if he called him, he could not --

MR. BOLDING: Your Honor --

MR. BUTLER: -- be an attorney.

MR. BOLDING: No, no.

THE COURT: Proceed.

MR. BUTLER: He could not be an attorney representing the defendant. That was our objection then. This man should not represent Mr. Washington because he is a potential witness. That's why Mr. Cooper is not. Mr. Bolding gets up and says, "I have no intention at least this time of calling Mr. Hanrahan." Mr. Bolding was appointed. He told the Court yesterday he tried to subpoena Mr. Hanrahan.

I assume, therefore, he's prepared to withdraw himself from the case if that's his present posture.

It seems that it's all right, Mr. Bolding and Mr. McDonald think for a defense attorney to mention the former verdict but it would be impossible for the State to. I certainly don't understand that the way that the rules of evidence operate.

They characterize rule 314 as a defense protective rule. I assume what they're saying is that that rule does not also grant the State a right to a fair trial because if you assume that it goes only one way, that's the logical conclusion of that.

Your Honor, I think that this court should be concerned with the opinions stated in Smith v. Smith where it says that the former verdict or former decision, opinion used in which they granted a new trial should not be considered by the jury in the new case.

The State, your Honor, in this case has attempted to bring to the Court for its consideration legal authority. Mr. Bolding keeps telling us, "Later, Judge, later, I'll have it later." The time to make the decision on this admissibility of the Supreme Court opinion is now. He's already

told the Court, the jury, your Honor, that the reason a case is retried was because the Supreme Court found that the County Attorney's office willfully withheld evidence from the defendant, and submit that that statement of Mr. Bolding cannot be cured, that the proper law is, that no reference to what happened at the last trial should be used and certainly that no attorney should be permitted to tell that jury what a legal ruling was, the effect of that ruling, and then ask that jury to consider that ruling on the question of guilt or innocence. That's what Mr. Bolding wants that jury to do.

The only cure, your Honor, is a mistrial. The State is well aware that if the position I'm taking is wrong, if a mistrial is not proper, that man walks, I know that.

THE COURT: And I expressed my concern about that, Mr. Butler.

MR. BUTLER: I know that, your Honor. It's not something, it's not a statement that I make lightly. I am convinced, your Honor, though that because of the improper and illegal argument of Mr. Bolding in his opening statement, that manifest necessity indicates we've got to have a mistrial. He caused it. I don't think there's any way

you can tell that jury now, "I don't want you to remember what Mr. Bolding told you about the Supreme Court granting a mistrial because of misconduct on the part of the County Attorney" and I think, your Honor, that the only decision is to have a mistrial granted now and the decision, now, I think should be made now, today as far as that evidence of the grand jury -- or excuse me, evidence of the Supreme Court opinion. We can't wait five days, six days, eight days down the line.

THE COURT: Have you considered the effect that I think, my recollection is that you failed to object for the record in point of time to that particular statement on the merits --

MR. BOLDING: He did.

THE COURT --of a review of the granting of the motion for mistrial.

MR. BUTLER: Yes, your Honor, I have.

THE COURT: Mr. Bolding?

MR. BOLDING: Yes, Your Honor. I've got to respond because what Mr. Butler put into the record, which might or might not be a personal matter but I've got to respond to clear the record on that. This wiring of the witness was not done with any

approval of the presiding Judge of this County, any other County or any Superior Court. The County Attorney went to the Judge and explained a situation to him, did not tell this Judge that Hanrahan had said, "I saw it and it was not Washington." Did not say that, so the Judge responded four things, Judge Richard Roylston responded four things: No. 1, I will not grant any certificate or any warrant or anything to you to do this wiring.

No. 2, I don't know of any law that would prohibit you doing this.

No. 3, you will find out that Bolding did not do anything improper, and

No. 4, if you want to do it, that's your problem. Go ahead and do it.

Now, that's the authority that the County Attorney operated under, that they keep referring to and keep going to the news media about some big authority from the presiding Judge. There was no authority and Richard Roylston will tell you that.

Now, No. 2, he did not object at any time to that portion of my opening statement.

No. 3, I have not told this Court that I can positively furnish you with a

case which will let me get that in. I think I will be able to give you some law to show that I can get that in. I still think I can.

No. 4, your Honor, is rule 314 and I haven't even looked at it, haven't annotated it, haven't done anything in that respect, but my guess is that that rule has been interpreted only against the State. How could the introduction of evidence that twelve people found a man guilty before, how in anybody's sense of the word or anybody's imagination or Mr. Butler's imagination, how could that help the defendant? It cannot.

I didn't go into this matter, the prosecutor went into the matter initially. I think that the Court would be wrong in granting a mistrial and I think we ought to get on with it unless we're going to have a motion for the mistrial on the same basis every morning until 10:20. I just think it's wrong. Mr. Butler is scrambling. He knows the case is going against him and he wants out of it, and I would ask for time to check into rule 314.

THE COURT: give you fifteen minutes.

(RECESS)

XIII. Mr. Bolding's and Mr. McDonald's Final Arguments Opposing Mistrial Declaration.

[Pagds 160-169]

THE COURT: Mr. Bolding, you have some additional authority.

MR. BOLDING: Your Honor, yes, and for the record, I do want to state this also. The Court granted me, just so that the record is clear, on yesterday as the Court remembers, the prosecutor filed his motion for mistrial. The matter was completely heard by the Court and, apparently, decided at that time by the Court adverse to the County Attorney. I had no opportunity, took no opportunity over the evening recess to search that area at all because I felt that the Court was right in his ruling and spent no time on it. The prosecutor spent time with three other attorneys and I don't know how many law clerks in trying to find some area so that he could get a mistrial because he cannot stand up here and tell you anything except that he feels that the jury, if this case goes on to it's completion, will come back with a not guilty.

Now then, after the motion for mis-

trial -- before mistrial was reurged this morning, I had not time to research and the Court granted me 15 minutes. I've taken 20, 25 or 30 minutes and still, have utilized the services of one or two other attorneys in about a 15-minute period here to try to find something to show to this Court, to show that this Court is incorrect if the Court is considering granting a mistrial. I want it clearly on the record that we are objecting to the mistrial and that we feel that the posture of the case is such that there will be a not guilty finding and that we feel that's the entire reason for the motion by the County Attorney.

Secondly, we want it on the record clearly that the County Attorney at no time during my opening statement made any objection to any mention I made of any finding by the Supreme Court of the State of Arizona in regard to a retrial of this matter because of the prosecution's misconduct and because of the suppression and the withholding of evidence by the prosecution. There was absolutely no -- no objection. There was no request by the prosecutor to have the jury disregard such remarks. There

was nothing, complete silence by the prosecutor. Later a motion for a mistrial was made after the completion of the opening statements and after an hour and a half recess for lunch. Finally the prosecutor then made his motion for a mistrial.

Thirdly, we would point out to the Court the case of State versus Sianez, S-i-a-n-e-z, 447 Pac 2d 874, 103 Arizona 616. In that case, your Honor, testimony was introduced by the prosecutor relating to records kept in the State Prison. I'm sorry, 103 Arizona 616 in which the prosecutor introduced testimony relating to records kept in the State prison. This was introduced for a purpose of identifying the defendant's handwriting and allegedly implying that the defendant had been an inmate in the State prison. This was not grounds for mistrial where the testimony was later stricken from the record and the jury was admonished to disregard it. That was on defendant's motion for mistrial.

The case of State versus Downey, 453 Pac 2d 521, 104 Arizona 375, was a case in which defense counsel on cross examination had referred to a prior proceeding,

the admission referred to a "prior proceeding." The admission of testimony alluding to a previous trial in which the defendant gave a false name was not so prejudicial as to require trial court to grant the defendant's motion for mistrial.

Two cases which are clearly in point which I bring to the Court's attention because I feel that if the Court does grant the motion for mistrial and again my more experienced and learned brethren in criminal law feel, would say that I'm a fool for standing here and I'm not representing George accurately and adequately by objecting to this mistrial because jeopardy has attached by the empanelling of the jury, according to all the cases, and the granting of a mistrial would preclude any further action in this particular case.

I know the Court is aware of the constitutional provision, article 2, section 10 which provides that no defendant shall be twice placed in jeopardy on the same offense and all of the cases under such provision which call for an erroneous granting of a mistrial as being once in jeopardy by -- as the defendant being placed

once in jeopardy.

I would point out to the Court the similarity between the words in case of State v. Downey and the words that the prosecutor used in his opening statement wherein he referred to two, not one, but two previous proceedings, two prior proceedings, and would submit to the Court that any implication received by the jury by those remarks would be that there were previous proceedings and what are previous proceedings, and that is a trial. And the Court, of course, in the case of State v. Downey referred to "Prior proceeding" the admission where defense counsel in cross examination had referred to prior proceedings, the admission of testimony alluding to the previous trial was not such as to grant a mistrial.

The allegedly implying the defendant had been an inmate in the State prison evidentally on that or another particular action, that was ordered stricken from the record and the jury admonished to disregard it.

Mr. Butler made no motion to have the jury disregard this. This is primary, according to the defense, according to what

the Supreme Court has told the defense in all cases, you must make an objection. If your objection is overruled, you must make the motion to have the jury disregard the erroneous matter which might have been inserted, or you waive your claim, you waive your right, and we say that Mr. Butler's opening the door by alluding to prior proceedings totally allows us to go into this situation. If not -- if it was error, if I said something that shouldn't have been said, then he should have objected. If that objection was overruled, he should have asked that the jury be instructed to disregard, if the objection was granted, he should ask that the Jury be instructed to disregard it. He didn't do those. His inaction now has called for him, because of the posture of the case and the fact that the witnesses are now totally evidently against the prosecutor in the case, makes him want a mistrial.

He knows that I have a remedy on appeal and this is the prosecutor's great right. You have a remedy on appeal and this is the Supreme Court of Arizona, at great length, you have a remedy on appeal. Sure,

we go through, we pick another jury, we go through another trial and three years from now, four years from now if there's any basis, if we can say that history gives us any basis to predict the future, four years from now we'll be back here with another trial and George Washington, Jr., will have been incarcerated, in custody for an additional four years.

Now, if the prosecutor insists on his motion for mistrial and if the Court in light of all the cases and in light of the jeopardy issue decides to grant the motion for mistrial, we'll be asking that Mr. Washington be released from custody because he simply cannot be held again for another four years while the prosecutor gives us our great remedy of appeal, and we feel that the Court should look at the practicalities of the situation, should know, based on the Court's experience and the Court's feelings and based on the fact that prosecutors rarely, no cases, no cases except the State v Ballinger case that I've been able to find where the prosecutor caused a mistrial -- prosecutors rarely ask for a mistrial. This is the first mistrial that I've ever had a prosecutor ask for in fifteen years, rarely

ask for a mistrial.

Why do they ask for a mistrial? Only if they see the case going down hill and that's the exact reason for this. We feel that the additional matters that have been presented preclude totally this Court from granting a mistrial. It would be error for this Court to grant a mistrial. It would cause the defendant much grief and problems in the future in regard to remaining in custody if the Court orders him to remain in custody pending any further action, and for those reasons and the additional reason Mr. McDonald has covered in one area, and I'd like for him to argue, we ask the Court deny the motion for mistrial, your Honor.

MR. McDONALD: I'll be very brief, your Honor. I just want to add one thing and that is, the Court's presented with a difficult problem no doubt but in looking at what was said and looking at this jury and looking at the State, given the discretionary nature in this trial it just seems inconceivable to me that this jury is so prejudiced at this time that they cannot give a fair trial to the State. Mr. Butler has admitted that with Mr. Bunting and other witnesses and the testi-

mony of some witnesses he doesn't think will be here, that the matters that were mentioned are going to come out as impeachment material anyway, so I'm just asking the Court to look at the practical effect of what has been done and to make that judgment on the basis of the fact whether or not the State can proceed with a fair trial.

I don't think this jury is inflamed or impassioned at the State. I think there's material the State doesn't want them to know about but it's clearly discretionary and if there is error, it seems to me that it's not the kind of error that has created a jury atmosphere that cannot render the State a fair trial, give them the remedies which should be approached before mistrial such as cautionary instructions, things of that nature.

That's all I would have to add to what's been said.

MR. BOLDING: And further, your Honor, in that regard and in regard to rule 314, we would bring again the Court's attention to the fact that 314 is protective in nature for the defendant. All cases under that rule discussed double jeopardy and discuss

whether the defendant was placed in jeopardy by the mentioning by the State of some prior proceeding. It's protective for the defendant, your Honor. The State cannot be placed twice in jeopardy. What's the reason for that rule? The reason is so that the defendant will receive a fair trial, and under 314, under rule 314, I could have been granted and I requested it, perhaps a motion for mistrial at the time Mr. Butler talks about prior proceedings. Probably I should have asked for a mistrial at that time and probably then at that time it would have had to be granted and the defendant would have been placed twice in jeopardy. I did not ask for a mistrial at that time. Mr. Butler opened the door.

If I'm wrong--if I'm wrong in my analysis of 314 as being protective for the defendnat only, as being protective for his right to a fair trial, as being protective for his rights so that a jury would not know there was a prior proceeding at which time he was found guilty. If I'm wrong then I ask the Court to instruct and admonish the jury that they will disregard statements that I made in regard to the prior -- a hearing by the Supreme Court or

a decision by the Supreme Court--if I'm wrong. I was unaware of 314 at the time, I mean unaware in the specific sense, your Honor. I'm aware of the rules in general. I was not aware specifically of 314 at the time any mention was made. Had I been aware of it, I think that I'm still correct in that it is protective of the defendant and was a rule that was put in force for his benefit, for the defendants generally, their benefit, and we fail to see how that gives the Court the right to grant a mistrial in this area and subject this man to another four years of incarceration just based upon the fact that it's, the prosecutor's case is not what he thought it should be.

XIV. Mr. Butler's Final Argument For Mistrial and Judge Buchanan's Mistrial Declaration.

[Pages 170-176]

MR. BUTLER: Your Honor, the reason the prosecutor's case is not what he thought it should be is because of the improper, illegal and unethical argument of defense counsel in his opening statement and because of that argument, that no instruction, had it been given immediately following the improper conduct, argument of defense counsel, no argument or instruction then and no instruction now can cure the prejudice that has been given. I assume, your Honor, that all the rules of criminal procedure, including rule 314, are designed to protect and ensure a fair trial for both sides. Mr. Bolding would have this Court find otherwise. He tells this Court about the Sianez case, records kept in the State prison and there a mistrial shouldn't have been granted. I think it's one thing to have that kind of evidence in front of a jury and have them told to disregard it. I think it's an

entirely different thing to have this jury told by the defense attorney that the highest court in the State of Arizona has considered this case and the highest court in the State of Arizona has said the State of Arizona through the County Attorney was guilty of misconduct.

MR. BOLDING: Your Honor, that's a misstatement. I did not say that.

THE COURT: I recall what the--

MR. BUTLER: Your Honor, I think my comments are the direct inference that can be drawn from what Mr. Bolding said in his argument. He stated that the Supreme Court overruled, that granted a new trial because the County Attorney or the prosecutor I think he said, willfully withheld evidence, suppressed, hid evidence. That's what he said. I think this jury cannot fairly sit and decide this case knowing that and I don't think any instruction is going to cure that.

This business about the prior proceeding, Mr. Bolding now says he didn't ask for a mistrial. Well, as a matter of fact he did. He asked for a mistrial because of those comments of mine and the Court denied that. I do not believe that

my comments on there being a prior proceeding implied that this defendant was present at this prior proceeding, at least that one of those prior proceedings was a trial or any other was. The Jury knows and knew at the time I made those statements that this defendant has a co-defendant, Mr. Rodriguez. They could have equally felt that those comments of mine applied to him.

Your Honor, we have, I think, a situation where, because of the improper argument, the State cannot obtain a fair trial. I'm aware of the Burrell case. I'm aware that whether the granting of mistrial is discretionary. And I'm aware that if the decision of the Court is to grant a mistrial and that's wrong, Mr. Washington has been placed in jeopardy, and I submit, your Honor, that's exactly what Mr. Bolding was aware of when he made that argument in his opening statement. That's the first time we were told either in court or in the Judge's chambers off the record that he intended to tell this jury about that Supreme Court decision. He knew at that time he could not get that decision in, what that opinion is. He knew at that time.

MR. BOLDING: Your Honor, that's a lie. I'll say that in open court.

THE COURT: I understand your position.

MR. BOLDING: Thank you, your Honor.

MR. BUTLER: Then it's my position if he did not know, that he should have known for someone that's practic law as long as Mr. Bolding has. He made those statements, they heard it and he knew they'd hear it.

Your Honor, I think that the motion for mistrial should be granted. I do not ask for the mistrial lightly. I know the consequences of my request and I do not ask because I fear anything other than the fact that this man right here has so prejudiced that jury that they will not be able to do what they are supposed to do, and that is give a fair trial to both sides.

THE COURT: I'm ready to rule.

MR. BOLDING: I have these cases if the Court wants them.

THE COURT: Go ahead

MR. BOLDING: No, I was just going to submit them to the Court.

THE COURT: Based upon defense counsel's remarks in his opening statement

concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted.

It will be ordered setting this case for retrial on Tuesday, January 14th, 1975, commencing at 9:30 o'clock a.m.

Is there anything further.

MR. BUTLER: I have nothing further, your Honor.

THE COURT: Mr. Bolding.

MR. BOLDING: Thank you, your Honor.

THE COURT: Call the jury in, please.

(Following proceedings resumed in open court before the jury):

THE COURT: Good morning, ladies and gentlemen.

Based upon a legal ruling which I have made in this case, I have declared a mistrial in the case which means the trial of this case is terminated at this point. The jury is excused from any further jury duty on this case.

I want to again thank you for your service and for your patience throughout the trial. Thank you very much, you are now excused.

MR. BOLDING: I want to thank you

also on behalf of George for being here. Thank you very much.

(Jury leaves courtroom and following proceedings held out of their presence):

MR. BOLDING: Your Honor, at this time I move for the release of Mr. Washington on his own recognizance and would ask that the Court, because of the posture of the case, grant such motion. Motion has been, previously set the bond in the amount of $50,000 and we would ask that the Court reconsider that at this time and allow Mr. Washington to at least be able, if we're going to go for another few weeks here, at least be able to be out so that he can help me in preparing the case, so that he can help in the finding of additional witnesses and to hold him in jail is prejudicial to his rights. The Court was wrong in granting the motion and he should be released.

MR. BUTLER: Your Honor, the State would oppose any release of the defendant and we would request the defendant be continued to be held on the bond as previously set in this case. This is a defendant that has been convicted of first degree murder--

MR. BOLDING: He has not been convicted, it's been set aside according to

this prosecutor and the Supreme Court. He's never been convicted. It's just as if there were no trial.

THE COURT: Go ahead.

MR. BUTLER: Your Honor, this is a defendant that has, I think the posture is now we can use two felony convictions, one of which is armed robbery. The trial is due to begin on Tuesday and I would submit, your Honor, that the defendant should be held on the previous bond. A mistrial was granted, your Honor, because of argument of defense counsel, not because of anything that the State did.

I think his motion should be denied.

THE COURT: Motion will be denied. Anything further at this time.

MR. BUTLER: The State has nothing further, your Honor.

THE COURT: Stand at recess.

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XV. Specific Statements (extracted from foregoing parts of the partial trial transcript) made to Judge Buchanan by Mr. Butler and Mr. McDonald During Argument For and Against Mistrial on January 10, 1977 on the subject of Jury Pre-Judice and Manifest Necessity.

[Pages 133 - 134]

[MR. BUTLER] "In AmJur they talked about, 58 Amjur 2d, 228, talk about any reference at a new trial, the result of a former trial or the same cause is improper. It should be at 58 Amjur 2d, 22 228 and the rule is 314. The Amjur citation goes on to indicate that the jury who are empanelled at the new trial must act upon their own responsibility and according to their own review of the testimony which is submitted to them entirely uninfluenced by the action of any of the jury."

[Page 134]

[MR. BUTLER:] "Your Honor, I think

that the rule 314 is mandatory, it says the former verdict and findings shall not be used. It doesn't say a defendant may waive that. I think what we have, your Honor, is a situation where, after the conviction of the defendant in this case, he has an excellent appeal point in that the jury was improperly influenced because they were told of the former conviction and, which I think defense attorney can argue on appeal, Mr. Bolding should not have done and it caused the defendant to not receive a fair trial."

[MR. BUTLER] " I think now is the time the decision should be made as to whether or not Mr. Bolding has the right to introduce evidence of the Supreme Court decision in granting or in affirming the lower court's decision in granting a new trial. It's the opinion of the State that no curative instruction given by the Court could in this case adequately cure the damage that has been done by Mr. Bolding.

The State, the position of the State has been so prejudiced by his illegal and improper argument that the State feels that it is necessary to have a mistrial granted now."

[Pages 146-147]

[MR. BUTLER] "I think that because of Mr. Bolding's argument the case has gotten completely out of hand. I would suggest to the Court, your Honor, a mistrial is a manifest necessity at this time because of the conduct of Mr. Bolding and I would request that my mistrial motion be granted.

THE COURT: Thank you. Mr. Bolding."

[Page 157]

[MR. BUTLER] "I am convinced, your Honor, though, that because of the improper and illegal argument of Mr. Bolding in his opening statement, that manifest necessity indicates we've got to have a mistrial. He caused it."

[MR. McDONALD]: "I'll be very brief, your Honor. I just want to add one thing and that is, the Court's presented with a difficult problem no doubt but in looking at what was said and looking at this jury and looking at the State, given the discretionary nature in this trial it just seems inconceivable to me that this jury is so prejudiced at this time that they cannot give a fair trial to the State. Mr. Butler had admitted that with Mr. Bunting and other witnesses and the testimony of some witnesses he doesn't think will be here, that the matters that were mentioned are going to come out as impeachment material anyway, so I'm just asking the Court to look at the practical effect of what has been done and to make that judgment on the basis of the fact whether or not the State can proceed with a fair trial.

I don't think this jury is inflamed or impassioned at the State. I think there's material the State doesn't want them to know about ***"

[MR. BUTLER] "Your Honor, the reason the prosecutor's case is not what he thought it should be is because of the improper, illegal and unethical argument of defense counsel in his opening statement and because of that argument, that no instruction, had it been given immediately following the improper conduct, argument of defense counsel, no argument or instruction then and no instruction now can cure the prejudice that has been given. I assume, your Honor, that all the rules of criminal procedure, including rule 314, are designed to protect and ensure a fair trial for both sides. Mr. Bolding would have this Court find otherwise. He tells this Court about the Sianez case, records kept in the State prison and there a mistrial shouldn't have been granted.

I think it's one thing to have that kind of evidence in front of a jury and have them told to disregard it. I think it's an entirely different thing to have this jury told by the defense attorney that the highest court in the State of Arizona has considered this and the highest court in the

State of Arizona has said the State of Arizona through the County Attorney was guilty of misconduct.

I think this jury cannot fairly sit and decide this case knowing that"

[MR. BUTLER] "Your Honor, we have, I think a situation where, because of the improper argument, the State cannot obtain a fair trial. I'm aware of the Burrell case. I'm aware that whether the granting of a mistrial is discretionary."

[Pages 172-173]

[MR. BUTLER] "Your Honor, I think that the motion for mistrial should be granted. I do not ask for the mistrial lightly. I know the consequences of my request and I do not ask because I fear anything other than the fact that this man right here has so prejudiced that jury that they will not be able to do what they are supposed to do, and that is give a fair trial to both sides.

THE COURT: I'm ready to rule."

XVI. Specific Statements (extracted from foregoing parts of the partial trial transcript made to Judge Buchanan by Mr. Butler, Mr. Bolding, and Mr. McDonald during Argument For and Against Mistrial on January 10, 1975 on the subject of Alternatives to Mistrial.)

[Page 139]

[MR. BUTLER] "I think now is the time the decision should be made as to whether or not Mr. Bolding has the right to introduce evidence of the Supreme Court decision in granting or in affirming the lower court's decision in granting a new trial. It's the opinion of the State that no curative instruction given by the Court could in this case adequately cure the damage that has been done by Mr. Bolding."

[MR. BUTLER] "The State, your Honor, in this case has attempted to bring to the Court for its consideration legal authority. Mr. Bolding keeps telling us, "Later, Judge, later, I'll have it later." The time to make the decision on this admissibility of the Supreme Court opinion is now. He's already told the Court, the Jury, your Honor, that the reason a case is retried was because the Supreme Court found that the County Attorney's office willfully withheld evidence from the defendant, and I submit that that statement of Mr. Bolding cannot be cured, that the proper law is, that no reference to what happened at the last trial should be used***"

[MR. BUTLER] "The only cure, your Honor, is a mistrial. The State is well aware that if the position I'm taking is wrong, if a mistrial is not proper, that man walks. I know that.

THE COURT: And I expressed my concern about that, Mr. Butler.

MR. BUTLER: I know that, your Honor. It's not something, it's not a statement that I make lightly. *** I don't think there's any way you can tell that jury now, "I don't want you to remember what Mr. Bolding told you about the Supreme Court granting a mistrial because of the misconduct of the County Attorney" and I think, your Honor, that the only decision is to have a mistrial granted now and the decision, now, I think should be made now, today as far as that evidence of the grand jury -- or excuse me, evidence of the Supreme Court opinion. We can't wait five days, six days, eight days down the line."

[Pages 167-168]

[MR. McDONALD] "I don't think this jury is inflamed or impassioned at the State. I think there's material the State doesn't want them to know about but it's clearly discretionary and if there is error, it seems to me that it's not the kind of error that has created a jury atmosphere that cannot render the State a fair trial, given [sic] the remedies which should be approached before mistrial such as cautionary instructions, things of that nature.

That's all I would have to add to what's been said."

[Page 169]

[MR. BOLDING] "If I'm wrong-- if I'm wrong in my analysis of 314 as being protective for the defendant, only as being protective for his right to a fair trial, as being protective for his rights so that a jury would not know there was a prior proceeding at which time he was found guilty. If I'm wrong then I ask the Court to instruct and admonish the jury that they will disregard statements that I made in regard to the prior -- a hearing by the Supreme Court or a decision by the Supreme Court-- if I'm wrong. I was unaware of 314 at the time, I mean unaware in the specific sense, your Honor. I'm aware of the rules in general. I was not aware specifically of 314 at the time any mention was made. Had I been aware of it, I think that I'm still correct in that it is protective of the defendant and was a rule that was put in force for his benefit ***"

[MR. BUTLER] "Your Honor, the reason the prosecutor's case is not what he thought it should be is because of the improper, illegal and unethical argument of defense counsel in opening statement and because of that argument, that no instruction, had it been given immediately following the improper conduct, argument of defense counsel, no argument or instruction then and no instruction now can cure the prejudice that has been given."

[MR. BUTLER] "Your Honor, I think my comments are the direct inference that can be drawn from what Mr. Bolding said in his argument. He stated that the Supreme Court overruled, that granted a new trial because the County Attorney or the prosecutor I think he said, willfully withheld evidence, suppressed, hid evidence. That's what he said. I think this jury cannot fairly sit and decide this case knowing that and I don't think any instruction is going to cure that."